

MILITARY LAW REVIEW VOL. 94

A Criminal law Symposium: Introduction

ARTICLES

Advocacy on Behalf of a Major Field Command:
When It Begins, What It Should Accomplish,
and Suggestions How It Should be Done

The Residual Hearsay Exceptions:
A Primer for Military Use

Military Justice Within the British Army

Legal Aspects of Military Service in Ancient
Mesopotamia

BOOK REVIEWS

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MILITARY LAW REVIEW (USPS 482-130)

ADMINISTRATIVE INFORMATION

EDITORIAL POLICY: The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research. The *Review* encourages Frank discussion of relevant legislative, administrative, and judicial developments. Writings offered for publication should be of direct concern and import in military law, and preference will be given to those writings having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each writing are those of the author and do not necessarily reflect the views of The Judge Advocate General or any governmental agency. Masculine pronouns appearing in the pamphlet refer to both genders unless the context indicates another use.

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901,

Footnotes should be double spaced and should appear as a separate appendix at the end of the text. Footnotes should be numbered consecutively from beginning to end of a writing, not chapter by chapter. Citations should conform to the *Uniform System of Citation* (12th ed., 6th prtg., 1980) copyrighted by the *Columbia, Harvard, and University of Pennsylvania Law Reviews* and the *Yale Law Journal*.

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The Board will evaluate all material submitted for publication. In determining whether to publish an article, comment, note or book review, the Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality and value to the military legal community. There is no minimum or maximum length requirement.

When a writing is accepted for publication, a copy of the edited manuscript will be provided to the author for prepublication approval. However, minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, neither galley proofs nor page proofs are provided to authors.

Italicized headnotes, or summaries, are inserted at the beginning of most writings published in the *Review*, after the authors' names. These notes are prepared by the Editor of the *Review* as an aid to readers.

Reprints of published writings are not available. However, authors receive complimentary copies of the issues in which their writings appear. Additional copies are usually available in limited quantities. They may be requested from the Editor of the *Review*.

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Military Law Review articles are also indexed in the *Advance Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalog of United States Government Publications*; *Law Review Digest*; *Index to U.S. Government Periodicals*; *Legal Resources Index*; two computerized data bases, the *Public Affairs Information Service* and *The Social Science Citation Index*; and other indexing services.

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A CRIMINAL LAW SYMPOSIUM: INTRODUCTION

In this issue the *Military Law Review* is pleased to present several articles and book reviews dealing with various aspects of military and civilian criminal law and procedure. This is the fifth criminal law symposium issue which the *Review* has presented since the symposium series began with volume 80, the spring 1978 issue.¹ Each symposium issue is a collection of articles dealing with one of the four general areas of military law and practice.² It is hoped that individual volumes are more useful to readers as a result of this format.³

In the opening article, Brigadier General Wayne E. Alley draws upon his years of experience as a military appellate judge, trial attorney, and judge advocate to provide an overview of criminal appellate advocacy from initial investigation, arrest, and preparation of charge sheets, through trial and appeal. He discusses the difficulties in meshing civilian concepts of individualism and justice with military needs for discipline and accomplishment of command missions.

General Alley's article was originally prepared and delivered by him as a speech at the 1981 Homer Ferguson Conference on Appellate Advocacy, sponsored by the United States Court of Military Appeals. In 1981, General Alley retired from military service³ and became dean of the College of Law of the University of Oklahoma.

One of the most important developments in military criminal law during recent years has been the promulgation of the new Military Rules of Evidence. These Rules, replacing chapter XXVII of the Manual for Courts-Martial, govern the use of all types of testimony, documents, and physical evidence, as evidence in court-martial pro-

¹The previous criminal law symposium issues were volume 92, spring 1981; volume 88, spring 1980; volume 87, winter 1980; and volume 84, spring 1979.

²The four areas are: criminal law or military justice; administrative and civil law (including legal assistance); contract or procurement law; and international law.

³General Alley served as Judge Advocate, United States Army Europe and Seventh Army, Heidelberg, Germany, from 1978 to 1981.

ceedings. The Military Rules, which took effect on 1 September 1980, are largely based upon the Federal Rules of Evidence, promulgated in 1975 for use by United States district courts and magistrates. The text and analysis of the Military Rules may be found in Appendix 18, Manual for Courts-Martial, added to the Manual by Change 3.

The Military Rules have been and will continue to be a fruitful source of scholarly commentary. Captain Edward D. Holmes has provided an article about Military Rules 803(24) and 804(b)(5), dealing with hearsay exceptions not otherwise specified, or residual exceptions. The text of the two rules was taken from the Federal Rules with little change.

The purposes of Congress in approving the residual exceptions are revealed through examination of the legislative history of the Federal Rules of Evidence. Notice requirements, the discretion of the trial court in admitting or excluding proffered hearsay evidence, and related topics are considered. Substantive standards for admission are discussed, and the relevance of the sixth amendment right of confrontation is examined. Extensive discussion of federal and military case law is provided.

Captain Holmes concludes with several suggestions for use of the residual exceptions by counsel. He states that the Article 39(a), U.C.M.J., session is an ideal setting in which to litigate admissibility of hearsay under the residual exceptions.

Captain Holmes is a reserve judge advocate and has been employed as a prosecutor by the United States Department of Justice at Kansas City, Missouri, from 1977 to the present. He served on active duty from 1973 to 1976 at Fort Bliss, Texas.

Much insight can be gained from examining the military legal systems of other countries. The *Review* has often published articles describing foreign systems of military justice. Two such articles appear in the present volume, one on modern British military justice, and the other on ancient Mesopotamian military law.

British military criminal law is of particular interest for purposes of comparison because of the military and legal traditions shared by

the British and American people. The *Review* has published articles on British military law several times previously.⁴

Mr. Peter J. Rowe, a British legal scholar, describes the system of military justice used in the British armed forces. Courts-martial trial and appellate proceedings are discussed, along with summary disposition by the commanding officer, the equivalent of American nonjudicial punishment. The tension between the requirements of military discipline and civilian justice, so familiar to American military lawyers, is considered.

Mr. Rowe reviews the European Convention on Human Rights and the case law developed by the European Commission and Court established by the Convention. He discusses the possibility that British military justice procedures may not satisfy the Convention's requirements in certain respects. Mr. Rowe concludes with a proposal for amendment of existing law to redistribute punishment authority between commanders and courts-martial, and to accomplish other changes.

Mr. Rowe is a barrister, and serves as a lecturer with the Faculty of Law of the University of Liverpool. He has published several writings on British military law and other subjects.

Dr. Victor H. Matthews, a historian, has prepared an article on military law in ancient Mesopotamia. Information about this law has been gleaned by archeologists from clay tablets bearing cuneiform inscriptions originally prepared approximately thirty-eight centuries ago. These tablets were the official records of the government of Hammurabi of Babylon, and of the ancient Kingdom of Mari, located in what is today Syria. Dr. Matthews writes of disciplinary problems as well as several topics today encompassed by administrative law. He is a member of the faculty of Anderson College, Anderson, South Carolina.

⁴Delmar Karlen, *Court-Martial Appeals in England*, 20 Mil. L. Rev. 65 (1963); Brigadier Richard C. Halse, *Military Law in the United Kingdom*, 15 Mil. L. Rev. 1 (1962). A third article which provides some information about British military justice at the time of the American Revolution is: George L. Coil, *War Crimes of the American Revolution*, 82 Mil. L. Rev. 171 (1978).

The present volume offers three book reviews. Major Susan W. McMakin, a reservist in Richmond, Virginia, has reviewed *Lawyers, Psychiatrists, and Criminal Law: Cooperation or Chaos*, by Harlow M. Huckabee. This work discusses some of the problems raised by the use of psychiatric testimony in a wide variety of criminal cases. Major Joseph A. Rehyansky, on the staff of The Judge Advocate General's School, has prepared a review of *Military Rules of Evidence Manual*, by Professor Stephen A. Saltzburg, Major Lee D. Schinasi, and Major David A. Schlueter. The *Manual* sets forth the text and analysis of the Military Rules, together with comments by the authors and citations to cases interpreting and applying the Rules. Finally, the editor of the *Military Law Review* has provided comments on *Legal Thesaurus*, by William C. Burton.

The *Review* takes great satisfaction in presenting this fine collection of writings on a variety of criminal law topics.

PERCIVAL D. PARK
Major, JAGC, U.S. Army
Editor, *Military Law Review*

**ADVOCACY ON BEHALF OF A MAJOR
FIELD COMMAND:
WHEN IT BEGINS, WHAT IT
SHOULD ACCOMPLISH,
AND SUGGESTIONS HOW IT SHOULD BE DONE ***

by Brigadier General Wayne E. Alley* *

In this article, General Alley draws upon his years of experience as a military appellate judge, trial attorney, and judge advocate to provide an overview of criminal appellate advocacy from initial investigation, arrest, and preparation of charge sheets, through trial and appeal. He discusses the difficulties in meshing civilian concepts of individualism and justice with military needs for discipline and accomplishment of command missions.

This article was originally prepared and delivered by the author as a speech at the 1981 Homer Ferguson Conference on Appellate Advocacy.

The past decade has brought far-reaching developments in the military justice system. The overall trend has been to expand individual rights of soldiers in an attempt more nearly to assimilate concepts found in civilian life. This civilization of the criminal legal sys-

* This was a speech given by the author at the Sixth Annual Homer Ferguson Conference on Appellate Advocacy (1981). The Conference was sponsored by the United States Court of Military Appeals. Judge Homer Ferguson served on the Court of Military Appeals from February 17, 1956, to May 1, 1971, and has held the title of senior judge from the latter date to the present. Judge Ferguson held office as a U.S. Senator from Michigan, 1943-54, and as U.S. ambassador to the Philippines, 1955-56.

The opinions and conclusions presented in this speech are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

* * United States Army, retired. Dean, College of Law, University of Oklahoma, Norman, Oklahoma, 1981 to present. Judge Advocate, United States Army Europe and Seventh Army, Heidelberg, Germany, 1978-1981; Chief, Criminal Law Division, Office of The Judge Advocate General, Department of the Army, Washington, D.C., 1975-1978. Former judge on the U.S. Army Court of

tem has produced both good and bad results. The bad is a potential for diminished responsiveness of our legal system to the legitimate needs and problems of commanders.

The inherent differences between the military and civilian spheres preclude superimposing, point for point, the civilian justice system upon the military. The military legal system was created for the unique purpose of responding to the special needs of the military and to command. A heightened awareness of these needs by appellate counsel and appellate judges is necessary, as well as a determination actively to discharge the responsibilities of our legal system to command.

Advocacy for an appellate audience begins in the earliest stages of the case. Whether they articulate it or not, police, commanders and trial judges are all seeking affirmation of their own conduct. Successful resolution at the appellate level depends upon the pretrial and trial phases. Police investigatory techniques, charging decisions by the commander, the course of the trial—all fundamentally affect the ultimate outcome of the case and, conversely, are fundamentally affected by appellate decisionmaking.

The foundation for successful prosecution is laid during the initial police contact and criminal investigation. It is often here that the final judicial battle will be won or lost and it is here that appellate decisions first affect the outcome of the case. Police awareness of appellate disposition of cases has a heavy impact upon police action. Their frustrations and disappointments in the courtroom have taught to police the value of learning about appellate pronounce-

Military Review, and former Chief Trial Judge of the Army, U.S. Army Legal Services Agency, Falls Church, Va. Former instructor, Military Affairs Division, TJAGSA, Charlottesville, Va. B.A., 1952, and LL.B., 1957, Stanford University, Stanford, California. Completed 13th Judge Advocate Officer Career (Graduate) Course, TJAGSA, Charlottesville, Virginia, 1964–1965. Graduate of the Industrial College of the Armed Forces, Ft. McNair, Washington, D.C., 1974, and the U.S. Army Command and General Staff College, Ft. Leavenworth, Kansas.

General Alley is the author of *The Overseas Commander's Power to Regulate the Private Life*, 37 Mil. L. Rev. 57 (1 July 1967) (Career Course thesis); *Determinants of Military Judicial Decisions*, 65 Mil. L. Rev. 85 (summer 1974) (ICAF research paper); and *Making History as a Court Reporter*, The Army Lawyer, Sept. 1976, at 1.

ments. What does it profit to obtain evidence by the most expeditious means if the case is thereby lost and the offender set free?

The legal education of the police corps must provide the agents with usable guidance to employ proper police techniques. The very nature of police work demands crucial, on-the-spot decisions. Questions must be seen in colors of black and white, with little time to observe the finer shades of grey. Police decisions must often be made concerning complex issues, whose nuances could give legal scholars hours of fruitful contemplation. It is imperative for this reason that clear, concise guidance from above be available to illuminate the proper road. The responsibility to provide this guidance begins at the appellate level. Conversely, there is a responsibility for appellate judges at least to listen to what the police communicate through records of trial about their reasons for their actions and the environment in which they work.

Divergent appellate views on important issues, search and seizure for example, create confusion among police. Being unsure of the correct method of approach, the police agent becomes hesitant to act. The necessity for guidelines, and the need for appellate advocacy to help him, apply as strongly when the commander is involved in the law enforcement process. And he does have a necessary and legitimate role to play. The troops expect it; the public demands it. Certainly, committees of the Congress which have come to Europe to inquire into disciplinary and law enforcement problems in the United States Forces look to commanders for effective action and solutions. They don't look to appellate advocates and judges.

How are commanders' decisions affected by our appeals system? Charging decisions are often made with a view more toward obviating appellate issues than toward serving the needs of justice and the command. Undercharging results. An atmosphere of opportunism at times surrounds the charging decision, if the appellate tides ebb and flow. Certain types of cases may be favored and others avoided, only in deference to the prevailing mood at the appellate level.

The pretrial process in other areas is also affected by the awareness of appellate decisions. Article 32 investigation proceedings, whose purposes could effectively be achieved in a concise, summary fashion, may become protracted and cumbersome mini-

trials in response to fear of later reversal on grounds of a defective or inadequate Article 32 hearing. The well-known fact that command influence is anathema to the military judiciary has created in many senior commanders the belief that the slightest discussion of or interest in criminal cases could warrant charges of command influence and possible reversal. This stymies the necessary flow of information and advice within the chain of command and ignores the realities and necessities of military life. I soundly condemn unlawful command influence and am cautious in my own practice, but deplore caution to the degree that a commander feels he must not only be detached, but positively oblivious about wrongdoing.

During the trial stage, the impact of appellate watching predictably is greatest. The trial judge is naturally reluctant to be reversed by a higher court and tailors his courtroom actions to this end. He too can engage in appellate advocacy through an abundance of caution, reticence and possibly a tendency toward second-guessing the trial defense counsel.

The wise trial judge knows that brevity is the source of salvation. All his opinions and explanations, being subject to subsequent interpretation, may become grounds for reversal even when the ruling, standing alone, might have evoked no such display of appellate hostility. So, from his standpoint, the less said the better. This technique becomes more difficult to employ when special findings requests are made. However, brevity and ingenuity will allow the careful trial judge to avoid the appellate pitfalls under even these hazardous circumstances. He can do it by paring down his findings to spare recitations of the elements of an offense and skeletal recitals about affirmative defenses, with emphasis on his unique opportunities to assess credibility.

Judicial advocacy also shows up in a defensiveness in instructions and in a constant regard for protecting the record. Caution being the paramount virtue, another tendency along these lines is the "risk avoidance" syndrome. At the first suggestion of a controversial issue, the cautious judicial response will be to take cover behind the safest, most innocuous view. This view, needless to say, is not necessarily always the best. Although risk avoidance might protect the trial judge in some cases from possible embarrassment at the appellate level, it will rarely ensure that the needs of the command receive their due attention. Issues are smothered and commanders

are not educated as to what they can do. They are educated in negatives. Caution, in today's appellate climate, does not militate for rulings favoring command needs as opposed to those of the individual defendant.

In responding to the appellate trends of the times, the trial judge may become the patrol of the defense counsel. Tactical decisions of the defense counsel, which could be later interpreted as seeds of error, will evoke quick judicial interference, in order to avoid appellate contentions that proper judicial response at trial was lacking. Tactical advantage sought by trial counsel will be summarily discouraged on the same assumption. Lastly, the doctrine of harmless error will receive little credence, as the truly cautious trial judge will believe that no error at the appellate level is ever really harmless. None of this is helpful for a field command.

The goal of advocacy on behalf of the field command is to ensure that the military criminal legal system is responsive to its needs as well as to the needs of individual defendants and justice as a whole. It has long been recognized that the military community is a specialized society, with substantial differences from civilian society. These resulted in the development by the military of its own body of laws and traditions. Recognition of the special status of the military has been well established, with a lengthy legal history. Military law is nothing to be ashamed of.

In understanding command needs, it must be borne in mind that the legal system is merely part of the total responsibility of the commander. The legal system for the command is necessarily only a means to an end, and not the end itself. The axiology, if I may be permitted to quote from myself, from an earlier article,¹ includes the following properties:

1. Command is exercised toward the accomplishment of a mission.
2. Personal comfort, convenience, expressions of idiosyncratic behavior, and even safety are subordinated to that purpose.

¹Alley, *Determinants of Military Judicial Decisions*, 65 Mil. L. Rev. 85 (summer 1974) (ICAF research paper).

3. A high state of discipline within the command is a prerequisite for the accomplishment of its mission.

4. Discipline is exacted in small and symbolic ways routinely so that it may confidently be expected to exist in crisis.²

The commander's personal responsibility for attaining his mission requirements and his responsibility for his troops has no equivalent in the civilian sector. For the commander, the military legal system is inextricably bound to the concept of discipline. Military discipline demands a restriction on individualism. Any soldier who fails to recognize this is simply in the wrong profession.

In assisting the command to accomplish its mission, the legal system should be a reinforcement of the status of officers and noncommissioned officers. Changes in societal attitudes in the past two decades have precipitated a general reluctance to accept discipline, and disrespect for traditional military ways has increased among the younger, incoming troops. Although the authority of the commander and his designees need not be absolute, and is not so, it should nonetheless approach the status of an absolute in the mind of the soldier upon whose response to orders the accomplishment of the military purpose depends. The military legal system must not only stem the erosion of the commander's authority, but must seek to reinforce that status anew. In 1981, it has to do what many homes and schools and neighborhoods have not done—inculcate an acceptance of authority. Note I say "acceptance of authority" and not "respect," Acceptance is about all we can reasonably expect out of a legal system.

The overseas major field command has special problems, in addition to the needs of any major field command. The production of witnesses for trial is more burdensome in the overseas setting than here. Foreign nationals are often requested as witnesses and are not always compellable. I won't comment on the compellability of witnesses in the United States to appear in a court-martial aboard, for that is *sub judice*. Whatever rule is established, obtaining witnesses from the United States or other parts of the world is an expensive and time-consuming endeavour. The resources of the

²*Id.* at 102.

overseas command are already strained by mission essential requirements outside the legal system. For the command to be justified in expending funds for distant witnesses, true necessity must be shown. However, the witness in the United States requested by the defense is not always in that category. The witness production rules, particularly in the extenuation and mitigation area, make such requests a daily possibility. The family reunion phenomenon has arisen overseas, wherein one or both of the accused's parents are requested for the purpose of attesting to their child's good character, etc.³ Although ostensibly material, such witnesses often have minimal value during the court-martial and are merely taking a free trip at Government expense. Following one such recent case, involving the accused's mother, the SJA office received requests for reimbursement for three weeks of travel by the parent, on the theory that she had been "investigating" her son's case. The travel, fortunately, had all taken place after the court-martial and the request was therefore easily rejected. Nevertheless, the denial of these expenses generated a Congressional inquiry. The command may hardly be blamed for reluctance to expend scarce resources for the purpose of marginal witness production.

³The family reunion phenomenon may be a thing of the past as a result of recent changes to para. 75, Presentencing Procedure, and other provisions of the Manual for Courts-Martial, United States, 1969 (Rev. ed.). These changes have been made by Exec. Order No. 12315, 46 Fed. Reg. 39107 (July 31, 1981), effective 1 August 1981.

Previously, para. 75e, Production of Witnesses, has made no distinction between witnesses on the merits and witnesses in extenuation, mitigation and rebuttal, and in practice both types of witnesses have been treated as if they had equal importance. New para. 75e severely limits the availability of witnesses for the sentencing portion of the trial. Subpara. 75e(2) provides a list of factors to be considered in producing witnesses. A balancing test is prescribed, in which the value of the witness in aiding the court to determine an appropriate sentence is compared with the cost and inconvenience to the Government, the delay in the proceedings, and other consequences of producing the witness. *Id.* at 39110.

The same executive order amends para. 115 of the Manual to make clear that the same balancing test applies to production of government rebuttal witnesses as to defence witnesses in extenuation and mitigation. *Id.* at 39110-39111.

The changes made by Exec. Order No. 12315 are set forth in Message 8527, HQ DA, ATTN: DAJA-CL, 2917002 Jul 81, subject: Change to Paragraph 75, MCM.

My third subject is molded from observations as a law clerk and Army Court of Military Review Judge. I haven't served as an appellate advocate and so must concede that these remarks are somewhat in the category of a critic's observations about artists. Advocates are the artists and judges are the audience. However, the judges as audience only pay their unique form of admission when the artist's creativity so moves them.

The most important two decisions for an appellate advocate, it seems to me, are to determine what he or she wants and how to pare away distractors from the case so as to leave the objective looming plain. These two decisions are the essence of appellate strategy.

There is no harm in counsel's passing through a Walter Mitty stage of identifying objectives, so long as he recognizes the fantasy and puts it behind. That is, appellate defense counsel may wish that findings and sentence be disapproved, charges dismissed, trial counsel reprimanded for unprofessional conduct, the trial judge defrocked for incompetence, and counsel himself be commended by name in a case note in the Harvard Law Review. Appellate Government Counsel may wish for flat out affirmance, a stinging condemnation of the accused's misconduct, a judicially established rule of presumptive guilt for future similar cases, and a Legion of Merit followed by job offers from Leon Jaworski. Put these fantasies behind, and try to identify a feasible result for which to strive. When you have done this, argue for not more than one degree better a result than what you have identified as feasible. The idea that man's reach should exceed his grasp does not apply well to appellate advocacy.

My next suggestion is to take the feasible objective, with no more than that minor enhancement, and outline an oral argument. Do this before writing your brief. In the argument show why your result is desirable. Give the court a vision of why yours is the proper result in terms of social desirability in a military setting. Accentuate the positive, especially in arguing that the precedent to be established is a simple, practical and utile rule for the future. Outline this argument first, and don't clutter it up with evidence of your erudition. Your argument, in lay terms, is a pitch.

Now your brief is different. It is like a contract of adhesion you

want the court to sign after it has agreed to your pitch. No salesman ever closed a transaction by presenting his prospect a contract to pore over. The contract is a means to accomplish the agreed result motivated by the pitch. If you outline your argument first, accentuating the “why,” and then supply a brief of a more legalistic and technical nature, you will better approximate the decisionmaking sequence used by most judges.

In accentuating the “why,” the reasons of desirability predisposing the court toward your result, you have to talk about the case at hand and the people in it. Abstractions belong in your brief, if anywhere, and not in your argument. In your argument the facts, and the consequences of those facts, have to be supreme. This is the main point in every one of the dozen or so articles I’ve read on the subject of effective appellate advocacy.⁴ The highest compliment that can be paid to an appellate advocate is that his or her statement of the facts leaves no doubt as to what the law must be.

A minute ago I said that one of the two crucial decisions for a counsel is to pare away distractions from a case in order to leave the desired result, or objective, looming plain. Recognizing the distractors takes discernment, and paring them away takes a form of courage usually called the courage of exclusion. Part of this courage is accepting the risk of post-mortem criticism. If you want to avoid criticism, be egalitarian about facts and legal principles. **Argue** and brief them all without discrimination. But if you want to win, drain the water away from the iceberg of your main objective so that it can’t be missed by the blindest or sleepest judge.

My final observation is that the best appellate advocates are seen by judges as being thoroughly professional. They don’t confuse themselves with the parties, but rather argue on behalf of the parties. They confine discussions of their personal beliefs to private conversation or to presentations outside the adversary process, such as this conference. Their zeal has a positive character, and it doesn’t embrace a denigration of opponent counsel. It doesn’t em-

⁴Davis, *The Argument of an Appeal*, Jurisprudence in Action (1953), classic advice from the master practitioner; Condas, *Appellate Advocacy: Influencing the Outcome*, 15 Trial 22 (1979); Kaufman, *Appellate Advocacy in the Federal Courts*, 79 Fed. Rules Dec. 166 (1979), analogizing the preparation of appellate advocacy strategy with military planning.

brace fudging on the facts or misstating the law. It accepts the proposition that the trial is over, and that the court will work with the record as it is and not as counsel wishes it could be. The best counsel don't whine when they lose or crow when they win.

Over the years I've put almost all counsel in this category of "the best counsel" and associating with these thoroughly meritorious men and women has been a great psychic income from military practice. This is not the occasion for expressing farewells or observations on our practice on the eve of my retirement; but it is a fit occasion to express gratitude toward, and affection for, the hundreds of counsel whose advocacy I have heard both at trial and on appeal and to remark that the professional practice of these men and women ornaments that most honorable title of "judge advocate."

THE RESIDUAL HEARSAY EXCEPTIONS: A PRIMER FOR MILITARY USE*

by Captain Edward D. Holmes* *

*The new Military Rules of Evidence, which came into use during 1980, have been and will continue to be a fruitful source of scholarly commentary. *** Captain Holmes' addition to the literature on this subject concerns Military Rules 803(24) and 804(b)(5), dealing with hearsay exceptions not otherwise specified, or residual exceptions.*

The purposes of Congress in approving the residual exceptions are revealed through examination of the legislative history of the Federal Rules of Evidence. Notice requirements, the discretion of the trial court in admitting or excluding proffered hearsay evi-

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The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, the Department of Justice, or any other governmental agency.

* *Judge Advocate General's Corps, United States Army Reserve. Employed by the U.S. Department of Justice as a prosecutor in the Organized Crime and Racketeering Section at Kansas City, Missouri, April 1977 to present. Served on active duty as a captain in the U.S. Army J.A.G. Corps, 1973-1976, assigned to Office of Staff Judge Advocate, U.S. Army Air Defense Center, Fort Bliss, Texas; served as trial counsel and administrative law officer. Member, 109th USAR JAG Detachment (International Law), Kansas City, Missouri. B.A., 1970, Virginia Military Institute, Lexington, Va.; J.D., 1973, Washington University School of Law, St. Louis, Mo. Completed Judge Advocate Officer Basic Course, Dec. 1973. Member of Missouri and Texas bars.

Captain Holmes is the author of articles published in *The Army Lawyer*, Aug. 1975, at 6; *id.*, Dec. 1975, at 1 (with LTC Dennis F. Coupe); and *id.*, Apr. 19, at 17 (with Mr. Robert M. Banks, Jr.); and articles at 1973 *Urb.L. Ann.* 267 and 1974 *Urb.L. Ann.* 141.

* * *Thirteen articles are cited in the fourth paragraph of note 2, *infra*. Several additional articles have since appeared or will appear in *The Army Lawyer* and the *Military Law Review* during the next year.

dence, and related topics are considered. Substantive standards for admission are discussed, and the relevance of the sixth amendment right of confrontation is examined. Extensive discussion of federal and military case law is provided.

Captain Holmes concludes with a suggestion, among others, that the Article 39(a) session is an ideal setting in which to litigate admissibility of hearsay under the residual exceptions. He offers suggestions to military prosecutors and defense counsel concerning the residual exceptions and their use.

I. INTRODUCTION

On 12 March 1980, President Carter issued Executive Order No. 12198, thereby amending Chapter XXVII of the Manual for Courts-Martial and adopting the Military Rules of Evidence for use in courts-martial.¹ Effective 1 September 1980, the Military Rules reflected in substantial form Articles I, II, IV, and VI through XI of the Federal Rules of Evidence which have been used in the United States district courts since 1975.² Included in Section VIII of the Military Rules are two controversial rules, initially found in the

¹ Exec. Order No. 12198 (1980), *reprinted in* the new Appendix 18 to the Manual for Courts-Martial, added by Change 3, dated 1 Sep. 1980, and also in West's Military Justice Reporter, at 8 M.J. XLVII-CCXXXIX (1980). The President is authorized by Art. 36, Uniform Code of Military Justice [hereinafter cited as U.C.M.J. in text and in footnotes], to prescribe "modes of proof" by regulations

which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the U.C.M.J.].

10 U.S.C. 836 (1976).

² The Federal Rules of Evidence were enacted as Pub.L.No. 93-575, 88 Stat. 1926 *et seq.* (1975). The Federal Rules of Evidence are hereinafter cited as F.R.E. or the Federal Rules in both text and footnotes; the Military Rules of Evidence, as M.R.E. or the Military Rules.

Sections I, II, IV, and VI through XI of the Military Rules correspond closely with Articles I, II, IV, and VI through XI of the Federal Rules. Between these sets of provisions there are only minor variations to account for differences in terminology and trial procedure.

Federal Rules, which establish new exceptions to the hearsay rule.³ Military Rule 803(24) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equiv-

Section I deals with "general provisions" of a procedural or policy nature. Section II is concerned with "Judicial Notice;" Section IV, with "Relevancy and its Limits;" Section VI, with "Witnesses;" Section VII, with "Opinions and Expert Testimony;" Section VIII, with "Hearsay;" Section IX, with "Authentication and Identification;" Section X, with "Contents of Writings, Recordings, and Photographs;" while Section XI deals with "Miscellaneous Rules."

In sharp contrast with the F.R.E., Section III of the M.R.E. is concerned with "Exclusionary Rules and Related Matters," while Section V adopts specific privileges applicable to the armed forces worldwide. For an excellent discussion of the M.R.E., comparing them with former military practice and with the F.R.E., see the seven articles comprising *Symposium: The Military Rules of Evidence*, The Army Lawyer, May 1980, at 1-58. Other articles on the new rules include Williams, *Admissibility of Polygraph Results Under the Military Rules of Evidence*, The Army Lawyer, June 1980, at 1-6; Schinasi and Green, *Impeachment by Prior Conviction: Military Rule of Evidence 609*, The Army Lawyer, Jan. 1981, at 1-23; Ross, *Rule 502—An Unfair Balance*, The Army Lawyer, Mar. 1981, at 5-9; Eisenberg, *Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence*, The Army Lawyer, Mar. 1981, at 9-26; Dean, *The Deliberative Privilege under M.R.E. 509*, The Army Lawyer, Nov. 1981, at 1-7; and Woodruff, *Privileges Under the Military Rules of Evidence*, 92 Mil. L. Rev. 5 (spring 1981). See also Major Rehyansky's review of *Military Rules of Evidence Manual* elsewhere in this issue.

³The "hearsay rule" is embodied in Rule 802, M.R.E., which provides that "hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial." Rule 801(c), M.R.E., defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement," in turn, is defined by Rule 801(a), M.R.E., as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(c), M.R.E., defines a "declarant" as simply "a person who makes a statement." In a departure from prior practice, admissions by a party-opponent are no longer considered hearsay, previously admissible as an exception to the rule. Rule 801(d)(2), M.R.E. Similarly, prior statements of a witness made under oath are no longer considered hearsay, but may be offered for their truth if inconsistent with trial testimony. Rule 801(d)(1), M.R.E.

alent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Military Rule 804(b)(5) is identical with Military Rule 803(24), except that the former rule is applicable only when the declarant is unavailable as a witness.⁴ Thus, when the declarant is "unavailable," either or both exceptions may properly be utilized. If, however, the declarant is "available," only Rule 803(24) may appropriately be used. Both provisions refer to the "foregoing exceptions," which embody the more traditional exceptions to the hearsay rule.⁵ Both military rules are substantially identical to their respective counterparts in Federal Rules 803(24) and 804(b)(5).

⁴The term "unavailable" is defined in Rule 804(a), M.R.E., which is discussed in greater detail in Part V of the text, *infra*. See note 246, *infra*, and accompanying text.

⁵The "foregoing exceptions" of Military Rule 803 exclude from the hearsay rule evidence of statements (or absence thereof) falling into the following categories, even though the declarant is available as a witness: (1) present sense impressions; (2) excited utterances; (3) then-existing mental, emotional, or physical conditions; (4) statements for purposes of medical diagnosis or treatment; (5) recorded recollection; (6) records of regularly conducted activity; (7) absence of entries kept in accordance with (6); (8) public records and reports; (9) records of vital statistics; (10) absence of public record or entry; (11) records of religious organizations; (12) marriage, baptismal and similar certificates; (13) family records; (14) records of documents affecting an interest in property; (15) statements in documents affecting an interest in property; (16) statements in ancient documents; (17) market reports, commercial publications; (18) learned treatises; (19) reputation concerning personal or family history; (20) reputation concerning boundaries or general history; (21) reputation as to character; (22) judgment of previous conviction; (23) judg-

Commonly known as the "catch-all," "open-ended," or "residual" exceptions to the hearsay rule, Federal Rules 803(24) and 804(b)(5) (hereinafter referred to as the "residual exceptions"),⁶ were a subject of lively debate in Congress and have since been applied in a variety of criminal and civil cases in both federal and state courts.⁷ The federal courts interpreting these rules have, accordingly, risen to the occasion with a now substantial body of case law defining the

ment as to personal, family, or general history, or boundaries. The "foregoing exceptions" of Military Rule 804(b) exclude from the hearsay rule evidence of statements falling into the following categories, provided the declarant is "unavailable": (1) former testimony; (2) statements under belief of impending death; (3) statements against interest; and (4) statement of personal or family history.

The two exceptions, Military Rules 803(24) and 804(b)(5), are practically interchangeable once it has been determined that the declarant is "unavailable."

⁶ Rules 803(24) and 804(b)(5), F.R.E., were referred to as the "residual" hearsay exceptions in legislative debates concerning their desirability. *See* Notes, Senate Committee on the Judiciary, S.Rep.No. 1277, 93d Cong., 2d Sess. 19 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7065 [hereinafter cited as S.Rep.No. 1277]. They have since been occasionally, and popularly, called the "catch-all" exceptions, *United States v. American Cyanamid Corp.*, 427 F. Supp. 859, 865 (S.D.N.Y. 1977), and the "open-ended" exceptions, *United States v. Oates*, 560 F.2d 45, 78 (2d Cir. 1977).

The term "residual" is more accurately descriptive. Since the two exceptions are identical except insofar as the need for the declarants' availability is concerned, any subsequent reference to Rule 803(24) may be considered applicable to Rule 804(b)(5) as well, and vice versa unless otherwise noted. Similarly, any subsequent reference to the "residual exceptions" will include both rules, unless otherwise noted.

⁷ The vast majority of reported decisions interpreting the residual exceptions are federal criminal cases. Eighteen states and Puerto Rico have also adopted the F.R.E., in whole or in part. Among the types of hearsay evidence admitted under the residual exceptions are, *e.g.*, affidavits (*United States v. Williams*, 573 F.2d 284 (5th Cir. 1978)); government forms (*United States v. White*, 611 F.2d 531 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980)); attorney memoranda (*Copperweld Steel v. Demag*, 578 F.2d 953 (3rd Cir. 1978)); grand jury testimony (*United States v. West*, 574 F.2d 1131 (4th Cir. 1978)); letters (*United States v. American Cyanamid Corp.*, 427 F. Supp. 859 (S.D.N.Y. 1977)); criminal investigators' reports of interview (*United States v. Thevis*, 84 F.R.E. 57 (N.D.Ga. 1979)); and trial testimony relating oral statements of others (*United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976)).

Under different facts and circumstances, however, similar hearsay has failed to meet the requirements of the residual exceptions. *See, e.g.*, *deMars v. Equitable*

contours of the residual exceptions, and highlighting the tactical considerations surrounding their use.⁸

This article is an introduction to the residual exceptions and is intended to be a useful "primer" for judge advocates involved in military trial and appellate practice. It is certainly foreseeable that military trial judges, the various Courts of Military Review, and the United States Court of Military Appeals will draw heavily on existing case law interpreting the F.R.E. Indeed, the Official Analysis⁹ of the M.R.E. states:

The decisions of the United States Court of Military Appeals and of the Courts of Military Review must be utilized in interpreting these Rules. While specific decisions of the Article III courts involving rules which are common both to the Military Rules and the Federal Rules should be considered very persuasive, they are not binding; *see* Article 36 of the Uniform Code of Military Justice. It should be noted, however, that a significant policy consideration in adopting the Federal Rules of Evidence was to ensure, where possible, common evidentiary law.¹⁰

Life Assurance Society, 610 F.2d 55 (1st Cir. 1979) (letters); United States v. Fredericks, 599 F.2d 262 (8th Cir. 1979) (oral statements); United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979) (telex); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) (affidavits).

⁸Further, the federal courts have raised the issue of the applicability of the sixth amendment right of confrontation, further complicating the impact of the residual exceptions in criminal practice. The U.S.Const., amend. VI, provides, in part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *See also* note 272, *infra*.

⁹Analysis of the 1980 Amendments to the Manual for Courts-Martial, 8 M.J. LXVII *et seq.* (1980) [hereinafter cited as Analysis, 1980, MCM, in footnotes, and as Official Analysis in the text]. This analysis was prepared under the guidance of the Department of Defense and "presents the intent of the drafting committee." The analysis is not part of Exec. Order No. 12198, note 1, *supra*, and does not necessarily reflect the views of the Department of Defense.

¹⁰Analysis, 1980, MCM, *supra* note 9, at LXXX. The Analysis further states:

Rule 101(b)(1) requires that the first such source be the "rules of evidence generally recognized in the trial of criminal cases in the

This article summarizes the applicable law developing in the federal sector, and offers suggestions and tactical considerations relating to the successful employment of these useful, but dangerous, rules of evidence by military trial and defense counsel. It is likely that the Military Rules of Evidence will have an impact on military trial practice similar to that of the Federal Rules of Evidence on civilian practice. Judge advocates will therefore find themselves utilizing the military equivalents of the federal residual exceptions in similar circumstances, giving rise to many of the same issues found in civilian criminal trials. This article, therefore, explores the legislative history behind the federal rules, which may have considerable impact on military practice as well; the procedural considerations relating to the employment of the rules; the substantive foundational requirements set forth in the residual exceptions themselves; and the troublesome issues surrounding the declarant's availability for cross-examination, including the requirements of the confrontation clause.

11. LEGISLATIVE HISTORY: BIRTH OF AN IDEA

Not surprisingly, the residual hearsay exceptions were born in controversy. The interplay of the Advisory Committee on Proposed Federal Rules, the Supreme Court, and both Houses of Congress provide a legislative history rich with explanation, declared intentions, and compromise.¹¹

United States District courts." To the extent that a Military Rule of Evidence reflects an express modification of a Federal Rule of Evidence or a federal evidentiary procedure, the President has determined that the unmodified Federal Rule or procedure is, within the meaning of Article 36(a), either not "practicable" or is "contrary to or inconsistent with" the Uniform Code of Military Justice. Consequently, to the extent to which the Military Rules do not dispose of an issue, the Article III federal practice when practicable and not inconsistent or contrary to the Military Rules shall be applied. In determining whether there is a rule of evidence "generally recognized," it is anticipated that ordinary legal research shall be involved with primary emphasis being placed upon the published decisions of the three levels of the Article III courts.

¹¹See *generally* S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 1-6 (2d ed. 1977).

The Federal Rules of Evidence are a distant descendant of Rule 43, Federal Rules of Civil Procedure, which provided that evidence should be admissible in federal district courts if admissible under either a federal statute, federal equity practice, or practice of the state in which the federal court is sitting, whichever rule most favored admissibility.¹² Similarly, Rule 26, Federal Rules of Criminal Procedure, required that federal courts use common law rules of evidence interpreted "in the light of reason and experience."¹³ Both civil and criminal evidentiary rules, however, developed in a haphazard fashion, with little uniformity.

In response to this confusing situation, the American Law Institute promulgated the Model Code of Evidence in 1942. The Model Code, however, was never adopted by any jurisdiction. The National Conference of Commissioners on Uniform State laws, at the instigation of the American Bar Association (A.B.A.), promulgated in 1953 the Uniform Rules of Evidence. Since the Uniform Rules were adopted by only a few states, including California and New Jersey, the A.B.A. persuaded the Judicial Conference of the United States to appoint a Special Committee to consider the propriety of "Federal Rules of Evidence." In response to the Special Committee's favorable recommendations, Chief Justice Earl Warren, in 1965, appointed an Advisory Committee on Rules of Evidence (hereafter referred to as the Advisory Committee).

In 1969, the Advisory Committee transmitted to the Judicial Conference a preliminary draft of the Proposed Rules of Evidence for United States District Courts and Magistrates. A revised draft was subsequently referred to the United States Supreme Court in 1971. After considerable redrafting, the Supreme Court approved, on November 22, 1972, a final draft to become effective ninety days later, absent Congressional action to the contrary. Included among these rules were the historical antecedents of the present residual hearsay exceptions, Draft Rules 803(24) and 804(b)(6).¹⁴ The Notes of

¹² Rule 43, Fed.R.Civ.Proc. (1938), *as amended*. These evidentiary provisions in Rule 43 were repealed when the F.R.E. were adopted.

¹³ Rule 26, Fed.R.Crim.Proc. (1946), *as amended*. These evidentiary provisions in Rule 26 were repealed when the F.R.E. were adopted.

¹⁴ These draft rules simply provided that "[a] statement not specifically covered

the Advisory Committee concerning these original residual exceptions are especially revealing:

The preceding **23** exceptions of Rule **803** and the first five exceptions of Rule 804(b) . . . are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. . . They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102.¹⁵

Federal Rule 102 was a significant factor in the calculus of admissibility. Rule **102** provided:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.¹⁶

Essentially, this rule of construction provided flexibility to any

by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness” is admissible as an exception to the hearsay rule.

The original Draft Rule 804(b)(5) was never enacted into law. The residual hearsay exception in Draft Rule **804(b)(6)** was therefore redesignated Rule 804(b)(5).

¹⁵ S. Saltzburg and K. Redden, *supra* note 11, at 556–57. The Advisory Committee’s Notes to the original proposed Rules 803(24) and **804(b)(6)** [now **804(b)(5)**] are not reported with the Advisory Committee Notes in West’s United States Code Annotated.

¹⁶ Federal Rule **102** was ultimately enacted in this form. Military Rule **102** is identical.

court interpreting the other federal rules of evidence, including the exceptions to the hearsay rule. Congress quickly postponed the effective date of the F.R.E., for a variety of reasons, until it expressly gave its approval. After much debate, the residual exceptions emerged with considerable changes.¹⁷

The House and Senate initially disagreed on whether the residual exceptions were necessary. The Senate, favoring the exceptions, reasoned that, if Rule 102 was relied upon to permit a broad construction of the other hearsay exceptions, those exceptions "could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed)."^{18, 19} As an example, the Senate cited *Dallas County v. Commercial Union Assoc. Ltd.*,²⁰ wherein the United States Court of Appeals for the Fifth Circuit held that inadmissible hearsay, a newspaper article, could nevertheless be considered by the trier of fact because it was so necessary and trustworthy.

¹⁷The flexibility permitted by Rule 102 was so great that the need for the residual exceptions was debatable. The House of Representatives reacted to the proposed residual exceptions by rejecting them altogether. It was felt that they "injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial." The House felt that Rule 102 would be sufficiently flexible to permit fashioning of extraordinary exceptions to the hearsay rule. The Senate, however, adopted a compromise position whereby a modified residual exception was approved. Notes of Conference Committee, H. Conf. Rep. No. 1597, 93rd Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Admin. News 7051, 7106 [hereinafter cited as H. Conf. Rep. No. 1597].

¹⁸S. Rep. No. 1277, *supra* note 6. Similarly, the Official Analysis of Military Rule 102 explains that Rule 102 is "only a rule of construction and not a license to disregard the Rules in order to reach a desired result." Analysis, 1980, MCM, *supra* note 9, at LXXXI. In short, Rule 102 was not meant to be an evidentiary tool such as are the residual exceptions.

¹⁹Moreover, the Senate recognized that the remaining hearsay exceptions "may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact." S. Rep. No. 1277, *supra* note 6.

²⁰286 F.2d 388 (5th Cir. 1961). See *United States v. Thevis*, 84 F.R.D. 57, 62 (N.D. Ga. 1979). "In essence, the residual exceptions incorporate the analysis of the Fifth Circuit holding in *Dallas County v. Commercial Union*." 84 F.R.D. at 62. Hereinafter, the various United States Courts of Appeal are referred to in the text and footnotes as the "First Circuit," "Second Circuit," and so forth.

The Senate, however, shared the reservations of the House that “an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.”²¹ To guard against this possibility, the Senate draftsmen added the restrictions now found in subsections (A), (B), and (C) of the residual exceptions, with this now widely-quoted explanation:

The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative actions. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.²²

Still not satisfied, the House, in the Conference Committee, insisted on adding the notice requirements found in the last sentence of the present residual exceptions. The F.R.E. were then passed by both Houses of Congress, and on 2 January 1975, President Ford signed them into law. The Rules became effective on 1 July 1975. Truly, as one federal court observed, “[t]he federal rules are the culmination of years of research and study and represent the most enlightened views on the law of evidence.”²³

The Congressional intention to limit use of the residual exceptions to rare or exceptional cases has been acknowledged on numerous occasions by the various courts interpreting the rules.²⁴

²¹S.Rep.No. 1277, *supra* note 6.

²²*Id.*

²³*Muncie Aviation Corp. v. Doll Fleet*, 519 F.2d 1178, 1184 (5th Cir. 1975).

²⁴*See, e.g.,* *deMars v. Equitable Life Assurance Society*, 610 F.2d 55, 61 (1st Cir. 1979); *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979); *United States v. Love*, 592 F.2d 1022, 1026 (8th Cir. 1979); *United States v. Mandel*, 591 F.2d 1347, 1368, *vacated*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S.Ct. 1647 (1980); *United States v. Bailey*, 581 F.2d 341, 347 (3rd Cir. 1978); *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir.), *cert. denied*, 42 U.S. 1107 (1977); *United*

111. PROCEDURAL CONSIDERATIONS

Although the most difficult and controversial issues surrounding the residual exceptions concern their substantive provisions relating to the quality of the hearsay evidence, the procedural context in which those provisions are considered merits close attention. The successful employment of those exceptions often depends heavily on procedural considerations.

States v. Medico, 557 F.2d 309, 315 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977); *United States v. Turner*, 475 F. Supp. 194, 200 (E.D. Mich. 1978); *Lowery v. Maryland*, 401 F. Supp. 604, 608 (D. Md. 1975), *aff'd*, 532 F.2d 750 (4th Cir.), *cert. denied*, 429 U.S. 919 (1976); *Maynard v. Commonwealth*, 558 S.W.2d 629, 634 (Ky. Ct. App. 1977).

Only one district court has rejected the Congressional intent in its application of the residual exceptions. In *United States v. American Cyanamid Corp.*, 427 F. Supp. 859 (S.D.N.Y. 1977), the court made this surprising observation:

Neither the Rule, nor the cases in this Circuit interpreting the Rule, however, impose any express limitation concerning exceptional cases. To every criminal defendant, his own case is exceptional. Rule 803(24) establishes sufficient express criteria which must be satisfied before an item of hearsay will be admissible. Since the exhibits listed above conform to these criteria, they should be received. There is no requirement that the Court find a case to be "exceptional," whatever that means, in order to receive any evidence. To imply such a provision, as suggested by the Judicial Committee, *supra*, would negate the requirement of Rule 102 F.R.Evid. that "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." And it would bring into each trial, the foot of the Chancellor, an historical enemy of our liberties.

In *United States v. Kim*, 595 F.2d 755, 766 note 54 (D.C. Cir. 1979), the District of Columbia Circuit characterized this analysis as "erroneous." The Official Analysis of the M.R.E., however, appears to be less sure. "The extent to which this exception may be employed is unclear. The Article III courts have divided as to whether the exception may be used only in extraordinary cases or whether it may have more general application." Analysis, 1980 MCM, *supra* note 9, at CCX.

The judicial response to these new exceptions to the hearsay rule is well summarized by the Fifth Circuit in *United States v. Mathis*, 559 F.2d 294 (5th Cir.), *cert. denied*, 429 U.S. 1107 (1977). The court noted:

Rule 803(24) was designed to encourage the progressive growth and development of federal evidentiary law by giving courts the flexibili-

III.A. NOTICE REQUIREMENTS

The final touch added by Congress to the residual exceptions was the "notice requirement" found in the last sentence of both exceptions.²⁵ The legislative history of the F.R.E., particularly the remarks of Representative Hungate (now a United States District Judge), indicates that:

the party requesting the court [for permission] to make the statement under this provision must notify the adverse party of this fact, and the notice must be given sufficiently in advance of trial and hearing to provide any adverse party a fair opportunity to object or contest the use of the statement.

We met with opposition on that. There were amendments offered that would let them do this right on into trial. But we thought the requirement should stop prior

ty to deal with new evidentiary situations which may not be pigeonholed elsewhere. Yet tight reins must be held to insure that this provision does not emasculate our well-developed body of law and the notions underlying our evidentiary rules.

559 F.2d at 299. *See also* State v. Maestas, 584 P.2d 182 (N.M. Ct. App. 1978). *But cf.* United States v. Gamer, 99 S. Ct. 333, 335 note 3 (1978), wherein Mr. Justice Stewart (joined by Mr. Justice Marshall), in a dissent from a denial of certiorari, stated: "It seems to me open to serious doubt whether Rule 804(b)(5) was intended to provide case-by-case hearsay exceptions, or rather only to permit expansion of the hearsay exceptions by categories." Until this doubt is resolved, the military courts are likely to hold a restrictive view as well. One commentary on the M.R.E. has suggested that:

[b]ecause the military drafters did not alter the federal format, it appears that they also intended a restrictive interpretation of the Rule, although the drafter's *Analysis* suggests that if civilian courts become more liberal in using the Rule, military courts may follow suit.

S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 365 (1981).

²⁵ Rule 803(24), F.R.E.; Rule 804(b)(5), F.R.E. The corresponding provisions in the M.R.E. are identical.

to trial and they would have to give notice before the trial. That is how we sought to protect them.²⁶

Neither the rules themselves nor their legislative history reveal how much notice should be given, what physical form the notice must take, what sanctions, if any, should be applied for failure to give notice, and, finally, how strictly the notice requirements should be enforced. Concerning the last issue, the courts are, not surprisingly, divided into two schools of thought, one requiring strict compliance, and the other permitting a more liberal flexibility.

The Second Circuit has been the most prolific court on this issue, although its reasoning is somewhat confused. In *United States v. Iaconetti*,²⁷ the Government announced on a Friday, at the close of the defense case, that on the following Monday it desired to introduce hearsay evidence in rebuttal pursuant to Rule 803(24). No earlier notice was given because the prosecution did not become aware of its necessity until the close of the defense case. The defendant did not request a continuance or claim unfair surprise. On appeal, the court found no error, holding:

While strict compliance with the rule is thus lacking, we agree . . . that the defendant was given sufficient notice here, and that some latitude must be permitted in situations like this in which the need does not become apparent until after the trial has commenced. The fact that defendant did not request a continuance or in any way claim that he was unable adequately to prepare to meet rebuttal testimony further militates against a finding that he was prejudiced by it.²⁸

In a footnote, the court added:

²⁶H. Conf. Rep. No. 1597, *supra* note 17; 120 Cong. Rec. H12256 (daily ed. Dec. 18, 1974). See *also* *United States v. Oates*, 560 F.2d 45, 72 note 30 (2d Cir. 1977).

²⁷540 F.2d 574 (2d Cir. 1976).

²⁸*Id.* at 578.

Our holding should in no way be construed as in general approving the waiver of Rule 803(24)'s notice requirements. Pre-trial notice should clearly be given if at all possible, and only in those situations where requiring pre-trial notice is wholly impracticable, as here, should flexibility be accorded. The legislative history makes clear the importance of the notice requirement.²⁹

A year later, in *United States v. Medico*,³⁰ the prosecution offered during trial, without advance notice, hearsay evidence pursuant to Rule 804(b)(5). The trial court admitted the evidence, but adjourned the trial for five days to allow the defense time to meet the evidence. On appeal, the Second Circuit noted only that the failure to give notice was "cured" by adjournment.³¹ The court's honeymoon with relatively liberal notice requirements, however, was soon to end. In *United States v. Oates*,³² the court volunteered the following dicta interpreting the legislative history of the notice requirements:

There is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforced. . .

Reference to the congressional debates confirms that there were serious misgivings about possible overbreadth of the original proposals submitted to Congress and of the Senate's modified version of the original proposals. Our examination of the congressional debates further discloses that the requirement that notice be given in advance of trial was the method selected by the Committee of Conference to prevent abuse of FRE 803(24) and 804(b)(5). Moreover, when reporting to the House of the Committee's recommendations Representative Hungate's . . . explanation of the advance notice requirement leaves

²⁹ *Id.* at 578 note 6.

30557 F.2d 309 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977).

³¹ *Id.* at 316 note 7.

³² 560 F.2d 45 (2d Cir. 1977).

no doubt that it was the intention of Congress that that requirement be read strictly.³³

The issue was apparently settled in *United States v. Ruffin*.³⁴ The trial judge had admitted hearsay pursuant to Rule 803(24) in the middle of trial over defense objection, and without any prior notice being given by the prosecution. Although the court gave the defense a recess to meet the evidence, the Second Circuit found error, stating "as Rule 803(24) clearly requires . . . that provision can be utilized *only* if notice of an intention to rely upon it is given in advance of trial (emphasis in original)."³⁵ Citing *Oates*, the court went on to remark:

when congress has spoken, our function is not to develop procedures as we think they might ideally be developed but rather to enforce the congressional intent which finds expression in legislative enactments such as the Federal Rules of Evidence. Our approval of the trial court's procedure here would, however, countenance outright circumvention of the carefully considered and drafted requirements of Fed. R. Evid. 803(24).³⁶

Similarly, in 1976, the Fifth Circuit originally applied the notice requirement liberally. In *United States v. Leslie*,³⁷ the trial court called as witnesses three co-defendants who had pled guilty. The prosecution sought to impeach them with prior inconsistent statements. Treating the statements as hearsay, the Fifth Circuit held

³³ *Id.* at 72-73 note 30.

³⁴ 575 F.2d 346 (2d Cir. 1978).

³⁵ *Id.* at 358.

³⁶ *Id.*

³⁷ 542 F.2d 285 (5th Cir. 1976).

³⁸ Although the trial court instructed the jury that the statements were not substantive evidence offered for their truth, but could be considered only in determining credibility, there was some doubt on appeal as to the sufficiency of those instructions. Accordingly, the Second Circuit treated the statements as if they were hearsay. 542 F.2d at 289.

they were admissible under Rule 803(24). Although the record did not disclose whether the Government gave its required notice, the court found no error, citing *Iaconetti*, because the defense had a “fair opportunity to meet the statements.”³⁹ Defense counsel had anticipated the witness being called to testify, and did, in fact, cross-examine the hearsay declarants thoroughly. Again, in 1978, the Fifth Circuit in *United States v. Evans*⁴⁰ applied its liberal interpretation. The court held that the defendant’s examination of hearsay documents during pretrial discovery was sufficient notice, stating:

The notice requirement of Rule 803(24) is intended to afford the party against whom the statement is offered sufficient opportunity to determine its trustworthiness in order to provide a fair opportunity to meet the statement. It must be interpreted flexibly, with this underlying policy in mind. Despite the denied motion for a continuance in order to examine the evidence, these defendants had ample notice and access before the trial.⁴¹

Two years later, however, in *United States v. Atkins*,⁴² the Fifth Circuit held it was not error for the trial court to reject hearsay offered under the residual exceptions because the defendant did not provide the requisite notice. Citing only *Ruffin*, the Second Circuit’s most recent decision, the court noted that “Congress intended notice requirements to be rigidly enforced.”⁴³

The Fourth Circuit seems to have joined the ranks of the “strict construction” courts. In *United States v. Mandel*,⁴⁴ the Govern-

³⁹*Id.* at 291. *See also* *State Farm v. Gudmunson*, 495 F. Supp. 794, 796 note 1 (D. Mon. 1980).

⁴⁰*United States v. Evans*, 572 F.2d 455 (5th Cir. 1978).

⁴¹*Id.* at 489.

⁴²618 F.2d 366 (5th Cir. 1980).

⁴³*Id.* at 372.

⁴⁴591 F.2d 1347, *vacated*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

ment offered hearsay evidence attributable to one or more unknown declarants in a clearly defined group of persons (i.e., the Maryland Senate). The trial court admitted the statements pursuant to Rule 803(24). On appeal, the court found the statements inadmissible because, *inter alia*, the required pretrial notice was not given. Citing no precedent, the court merely held:

The rule, in terms, requires the proponent to give the name and address of the declarant, and given the general proposition that the rule is not to be construed broadly, we see no reason to depart from its plain requirements.⁴⁵

Before the Second Circuit began its retreat from liberal interpretation, the Eighth Circuit in *United States v. Carlson*⁴⁶ adopted a similarly lenient view. In *Carlson*, a key Government witness unexpectedly refused to testify in mid-trial. The Government then offered his grand jury testimony, to which the defendant had been given access two days earlier. The trial court admitted the evidence under Rule 804(b)(5). On appeal, the Eighth Circuit reviewed the foregoing circumstances and found no error, stating:

this notice requirement should not be an inflexible and imposing barrier to the admissibility of probative evidence when the peculiar circumstances of a case militate against its invocation.⁴⁷

Citing *Iaconetti*, the court added:

Notice during trial is permissible on occasion. . . and Carlson could have sought a continuance if he felt that he was not prepared to rebut the Tindall testimony or contest its use at trial In any event, as the need for the grand jury testimony arose due to Carlson's own wrongdoing and as Carlson was provided a copy of the grand

⁴⁵ 591 F.2d at 1369. In *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333 (1978), the prosecution arguably failed to give pretrial notice, but the issue was not raised on appeal.

⁴⁶ 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

⁴⁷ *Id.* at 1355.

jury testimony two days before it was admitted at trial, Carlson was not prejudiced by the lack of any formal notice.⁴⁸

A year later, in *United States v. Lyon*,⁴⁹ the Eighth Circuit reaffirmed its Carlson analysis even though the Second Circuit had begun its retreat with *Oates*. In *Lyon*, a trial witness was unable to remember the events in question. The Government, previously unaware of the witness' poor memory, then offered pursuant to Rule 804(b)(5) a hearsay statement of the witness which had been provided to the defendant prior to trial. The Eighth Circuit, citing only its previous decision in *Carlson*, held that "under the circumstances, strict compliance with the notice provision of the Rule is not required."⁵⁰

The Third Circuit has also adopted the more liberal approach to pretrial notice. In *United States v. Bailey*,⁵¹ the Government gave the defendant notice of its intent to offer a hearsay statement pursuant to Rule 804(b)(5) after trial had commenced. Finding that the Government was not at fault in its delay, the trial court gave the defendant a short continuance, and admitted the statement. On appeal, the Third Circuit held that the policy considerations behind the notice requirements were met when the proponent was not at fault in his failure to notify, and the trial court offered the opponent a continuance to "meet and contest" the hearsay."⁵²

A similarly flexible view of the pretrial notice provision has been adopted by the First Circuit in *Furtado v. Bishop*,⁵³ a civil case. In

⁴⁸ *Id.*

⁴⁹ 567 F.2d 777 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978).

⁵⁰ *Id.* at 784.

⁵¹ 581 F.2d 341 (3rd Cir. 1978).

⁵² *Id.* at 348. In reaching its decision, the Third Circuit recognized that the legislative history indicated Congress intended a strict construction of pretrial notice requirements, and even noted the Second Circuit's decision in *Oates*. The court nevertheless created an "exception" to the rule, citing *Medico* and *Carlson*. The court did not even note the Second Circuit's later decision in *Ruffin*.

⁵³ 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

Furtado, the plaintiff offered the affidavit of a deceased attorney pursuant to Rule 804(b)(5). No pretrial notice was given. The trial court offered the defendant a week-long continuance, but defense counsel indicated it would not make any difference to his case. The defendant had been in possession of the affidavit for seven and one-half years, and was "alerted" by plaintiffs pleadings that factual material contained in the affidavit might become an issue at trial. Defense counsel even admitted he anticipated the affidavit might be offered. The trial court therefore admitted the hearsay evidence.

On appeal, the court found that, while the plaintiff was not blameless in his failure to give notice, exclusion of the evidence was not required because it was a civil case in which the trial court has discretion unrestricted by the confrontation clause of the sixth amendment. The court nevertheless warned future litigants that "they fail to give pretrial notice under the rule at their peril, and we expect trial judges to consider carefully statements offered under residual exceptions to the hearsay rule."⁵⁴ Thus, the First Circuit leaves open the possibility that in criminal cases a more inflexible approach may be appropriate.

Most of the reported decisions dealing with pretrial notice are concerned ultimately with what sanctions should be applied for failure to give any notice before trial. As the foregoing case law suggests, either the proffered hearsay is not admitted, or the opponent is usually given a continuance or recess to enable him to later contest its admissibility, thereby negating the prejudice caused by lack of notice. Since most of the reported cases dealing with this issue involve a complete lack of pretrial notice, there is little guidance as to how far in advance of trial notice is required to satisfy the rule. Although in *Iaconetti*, a three-day notice in mid-trial was considered insufficient, in *Carston*, two days' notice was deemed sufficient to enable the opponent to "meet the evidence."

It is suggested that no rigid time formula is appropriate, and that no more notice is required than is reasonably necessary to avoid

⁵⁴*Id.* at 93 (citations omitted). *Cf.* *State Farm v. Gudmunson*, 495 F. Supp. 794, 796 note 1 (D. Mon. 1980), where the "defendants who knew of the statements and should have known that they could be properly used for the impeachment of the defendant's witness were in exactly the same position as if some formal notice had been given."

surprise to the opponent of the hearsay evidence, and to enable him to counter the proponent's arguments as to admissibility. If, however, the opponent of the hearsay later requests a deposition of the declarant, an otherwise acceptable period of notice might be insufficient if exigencies preclude the taking of a deposition on such short notice.⁵⁵ Trial and defense counsel should therefore give as much notice as practicable to minimize the possibility of exclusion at trial or a finding of reversible error on appeal.

Similarly, there is little guidance concerning the manner in which the notice must be conveyed. A discussion of the admissibility of hearsay evidence under Rule 803(24) in a trial brief has been held to be a sufficient form of notice of the author's intent to utilize the residual exception at trial.⁵⁶ In a civil case, merely providing the other party with a copy of the statement during discovery was held to be a sufficient form of notice.⁵⁷ Likewise, if a defendant has access to Government exhibits containing the hearsay statement during pretrial discovery and his attorney actually examines the statement, no further expressions of notice may be necessary.⁵⁸ On the other hand, merely "alerting" the other party through pleadings that evidence existing only in hearsay form may be an issue was found to be an insufficient form of notice.⁵⁹ To avoid problems, it is most prudent to give notice in pleadings formally filed with the

⁵⁵S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 262 (Cum. Supp. 1981). *See also* S. Saltzburg, L. Schinasi, and D. Schlueter, *supra* note 27, at 366, where the authors note:

Although the Rule does not specify how far in advance notice must be given, the Rule states that the notice must provide the opponent with a fair opportunity to meet the evidence. Thus, timing may depend on how much preparation an opponent would need to fairly respond to the hearsay.

⁵⁶*United States v. Friedman*, 593 F.2d 109 (9th Cir. 1979).

⁵⁷*DeMars v. Equitable Life Assurance Soc.*, 610 F.2d 55, 61 (1st Cir. 1979). The notice requirements of residual exceptions do not, however, require that the proponent give copies of the statement to the opposing party. *United States v. Evans*, 572 F.2d 455, 489 (5th Cir. 1978).

⁵⁸*United States v. Evans*, 572 F.2d 455, 489 (5th Cir. 1978).

⁵⁹*Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

court, by registered or certified letter to opposing counsel, or, at least, orally on a verbatim record.

III.B. THE TRIAL COURT'S DISCRETION

The admissibility of hearsay is a matter within the sound discretion of the trial court. Military Rule 104 provides, in part:

(a) *Questions of admissibility generally.* Preliminary questions concerning . . . the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary.⁶⁰

With respect to the residual exceptions, "preliminary questions" of admissibility include whether the proffered statement satisfies the requirements of Rule 803(24) or Rule 804(b)(5), whether the proffered hearsay violates the confrontation clause of the sixth amendment, and whether a criminal defendant has waived his confrontation rights.⁶¹ Moreover, the exercise of the military judge's discretion pursuant to Rule 104 does not invade the province of the court members even though the military judge necessarily rules on factual questions which the members may later consider in their deliberations of the verdict.⁶² Since Rule 104(a) expressly states that

⁶⁰ Rule 104, M.R.E.

⁶¹ *United States v. Thevis*, 84 F.R.D. 57, 61 (N.D. Ga. 1979).

⁶² *Id.* at 71-72. See also rule 104(e), M.R.E., which provides: "This rule does not limit the right of a party to introduce before the members evidence relevant to

"in making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges," he may consider other inadmissible hearsay in deciding whether the proffered hearsay is admissible under the residual exceptions.⁶³ As the official analysis has noted, "[t]hese exceptions [to the rules of evidence] are new to military law and may substantially change military practice."⁶⁴

In deciding the "preliminary questions" of admissibility of evidence offered under the residual exceptions, the trial court has a "considerable measure of discretion."⁶⁵ This wide discretion is most apparent in the court's determination of the trustworthiness of proffered hearsay, and the balancing of its probative value against its prejudicial impact. In evaluating the trustworthiness of such evidence the trial court has a "wide latitude of discretion."⁶⁶ Similarly, the trial court's determination that the "interests of justice would

weight or credibility." Cf. *Huff v. White Motor Corp.*, 609 F.2d 286, 293-94 (7th Cir. 1979).

⁶³ Rule 104(a), M.R.E. See, e.g., *Huff v. White Motor Corp.*, 609 F.2d 286, 293 note 11 (7th Cir. 1979).

⁶⁴ Analysis, 1980 MCM, *supra* note 9, at LXXXIV. The Official Analysis goes on to state:

The Federal Rule has been modified, however, by inserting language relating to applications for continuances and determinations of witness availability. The change, taken from present Manual ¶ 137, is required by worldwide disposition of the armed forces which makes matters relating to continuances and witness availability particularly difficult, if not impossible, to resolve under the normal rules of evidence — particularly the hearsay rule.

⁶⁵ *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979). See also *United States v. White*, 611 F.2d 531, 537-38 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980); *United States v. Kim*, 595 F.2d 755, 766 (D.C. Cir. 1979). Military Rule 611(a) also provides the military judge with the power to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

⁶⁶ *United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). See also *United States v. Gomez*, 529 F.2d 412, 417 (5th Cir. 1976).

be better served" by admitting or excluding evidence under the residual exceptions is entitled to "deference" by an appellate court.⁶⁷

The trial court's discretion, however, is not "unfettered,"⁶⁸ and its exercise can be overturned on appeal for an abuse of that discretion.⁶⁹ Before such a ruling can be reversed, however, it must be "clearly erroneous" and prejudicial.⁷⁰ Perhaps the area in which a trial court may most easily abuse its discretion is its determination of whether hearsay evidence offered under the residual exceptions satisfies the confrontation clause of the sixth amendment. Both the Third and Eighth Circuits have reversed convictions in which hearsay offered under the residual exceptions (hereafter referred to as "residual hearsay") was found to be compatible with the confrontation clause, noting that "a court should exercise its discretion in order to avoid potential conflicts between confrontation rights and this hearsay exception."⁷¹ Moreover, the appellate courts, in reviewing trial court rulings for abuse of discretion, tend to emphasize that Congress intended the residual exceptions to have a limited scope.⁷² Thus, the more narrow and restrictive applications of the residual exceptions by trial courts are more likely to survive appellate review.

In exercising its discretion to make factual findings on which the admissibility of proffered hearsay is predicated, the court must necessarily find, either implicitly or explicitly, that certain facts are or are not established by a given quantum of evidence. While the case law is sparse on this issue, it appears the proponent of residual

⁶⁷ *United States v. Anderson*, 618 F.2d 487, 491 (8th Cir. 1980).

⁶⁸ *United States v. Mandel*, 591 F.2d 1347, 1368, *vacated*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

⁶⁹ *United States v. Friedman*, 593 F.2d 109, 118 (9th Cir. 1979); *United States v. Bailey*, 581 F.2d 341, 346 (3rd Cir. 1978).

⁷⁰ *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979); *Cooperweld Steel v. Demag*, 578 F.2d 953 (3rd Cir. 1978).

⁷¹ *United States v. Love*, 592 F.2d 1022, 1027 (8th Cir. 1979); *United States v. Bailey*, 581 F.2d 341, 347 (3rd Cir. 1978).

⁷² *See, e.g., Huff v. White Motor Corp.*, 609 F.2d 286, 294 (7th Cir. 1979); *United States v. Bailey*, 581 F.2d 341, 347 (3rd Cir. 1978).

hearsay must provide factual predicates for admissibility by a preponderance of the evidence.⁷³ The Tenth Circuit has even applied the preponderance standard in determining whether a defendant waived his confrontation rights,⁷⁴ although one district court has required that such a waiver be established by “clear and convincing evidence.”⁷⁵ The burden of establishing the factual predicate for admissibility, by whatever quantum of evidence, is on the proponent of the hearsay.⁷⁶ Similarly, the burden is on the prosecution to establish “unavailability” in its efforts to satisfy the confrontation clause.⁷⁷

The proponent of residual hearsay, however, must do more than merely convince the military judge that such evidence should be admitted. If such evidence is offered by the trial counsel, he must make a record sufficient to allow an appellate court to find that the military judge did not abuse his discretion. Conversely, if the accused offers residual hearsay, the trial counsel should insure that the military judge does not improperly exclude the proffered evidence thereby creating error. Similarly, defense counsel must be prepared to make a factual record that residual hearsay offered by the prosecution does not meet the requirements of Rule 803(24) or Rule 804(b)(5), or that it does not meet the standards of the confrontation clause. If the accused is offering the residual hearsay, defense counsel must be prepared to make a record showing that the requirements of the residual exceptions have been met, and that exclusion of the evidence would constitute an abuse of discretion.

⁷³*Huff v. White Motor Corp.*, 609 F.2d 286, 294 (7th cir. 1979).

⁷⁴*United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980). Editor's note: The author, Captain Holmes, tried this case for the Government and argued its appeal before the Tenth Circuit.

⁷⁵*United States v. Thevis*, 84 F.R.D. 57, 72 (N.D. Ga. 1979).

⁷⁶*Elizarraras v. Bank of El Paso*, 631 F.2d 366, 374 note 24 (5th Cir. 1980); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980) (*see* note 74, *supra*); *Huff v. White Motor Corp.*, 609 F.2d 286, 294 (7th Cir. 1979); *United States v. Kim*, 595 F.2d 755, 766 (D.C. Cir. 1979); *United States v. Thevis*, 84 F.R.D. 57, 72 (N.D. Ga. 1979).

⁷⁷*Ohio v. Roberts*, 100 S. Ct. 2531, 2538 (1980); *United States v. Pelton*, 578 F.2d 701, 709 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978).

The making of such a record is mandated, not only by the express wording of the residual exceptions themselves, but by Military Rule 103, which provides that timely objections or motions to strike, stating the grounds therefor, must appear in the record. Failure to make such a record at trial may preclude appellate review of any erroneous rulings.⁷⁸ Since the grounds for appeal by the Government are extremely limited, the burden of Rule 103 falls principally on the accused.⁷⁹ One military commentator has observed that “[e]xperience has shown that federal circuit courts take Rule 103 very seri-

⁷⁸Rule 103, M.R.E., provides in pertinent part:

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked.

The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

(b) *Record of offer and ruling.* The military judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The military judge may direct the making of an offer in question and answer form.

⁷⁹Obviously, if the military judge excludes residual hearsay offered by the prosecution, and the accused is nevertheless convicted, the residual hearsay issue becomes moot. If he is acquitted, the government may not appeal the acquittal. Only when the military judge dismisses a charge may the government appeal to the convening authority questions of law (not facts) contained in the ruling. Article 62(a), U.C.M.J.; *United States v. Bielecki*, 21 C.M.A. 450, 45 C.M.R. 224 (1972).

Similarly, if the military judge admits residual hearsay offered by the defense, and the accused is nevertheless convicted, the propriety of admitting such evi-

ously. If counsel there fail to protect or make a record . . . relief on appeal is simply denied.”⁸⁰ Indeed, the federal courts of appeal have required litigants to make careful records supporting the admission or exclusion of residual hearsay. Accordingly, the Official Analysis to Military Rule 103(a) warns that:

Failure to make a timely and sufficiently specific objection may waive the objection for purposes of both trial and appeal. In applying Federal Rule 103(a), the Article III courts have interpreted the Rule strictly and held the defense to an extremely high level of specificity . . . Rule 103 significantly changes military law insofar as hearsay is concerned. Unlike present law under which hearsay is absolutely incompetent, the Military Rules of Evidence simply treat hearsay as being inadmissible upon adequate objection.⁸¹

Moreover, the residual exceptions themselves require that the court determine certain facts on which admissibility is predicated. The Seventh Circuit has expressly noted that “Rule 803(24) requires . . . that the district court make certain findings with respect to the evidence sought to be admitted . . .”⁸² Failure of the trial court to characterize its admission of hearsay as done pursuant to the residual hearsay exceptions may be grounds for reversal, particularly if the proponent also fails to cite either exception.⁸³ The military judge should therefore make specific findings as required

dence is not likely to be an appellate issue. For the most part the exercise of the military judge’s discretion will be reviewed on appeal only when the court admits prosecution evidence over defense objection, or excludes evidence offered by the accused. **Thus**, Rule 103 serves primarily to impose on trial defense counsel the need to make a record for appellate review.

⁸⁰ L. Schinasi, *The Military Rules of Evidence: An Advocate’s Tool*, The Army Lawyer, May 1980, at 5.

⁸¹ **Analysis**, 1980, MCM, *supra* note 9, at **LXXXII**. *See, e.g.*, United States v. Rubin, 609 F.2d 51, 61–63 (2d Cir. 1979); United States v. O’Brien, 601 F.2d 1007 (9th Cir. 1979). *See also* Saltzburg, Schinasi, and Schlueter, *supra* note 24, at 12–19, for an excellent discussion of the impact of Rule 103 on military practice.

⁸² United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979).

⁸³ *Id.* *See also* United States v. Fredericks, 599 F.2d 262, 264 (8th Cir. 1979).

by the residual exceptions.⁸⁴ In particular, when “assessing the qualitative degree of trustworthiness of a particular statement, courts should inquire into the reliability of and necessity for the statement.”⁸⁵

To aid the trial court in assessing trustworthiness, the proponent should lay a proper foundation showing knowledge of the hearsay declarant.⁸⁶ Failure to make such a record at trial puts the proponent at a distinct disadvantage on appeal. In *Huff v. White Motor Corp.*,⁸⁷ the defendant offered a deceased person’s statement of how an automobile accident occurred for its truth pursuant to both residual exceptions. The trial court excluded the evidence “because it was hearsay and did not fall under certain specific hearsay excep-

⁸⁴*Furtado v. Bishop*, 604 F.2d 80, 90 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); *United States v. Fredericks*, 599 F.2d 262, 265 (8th Cir. 1979); *United States v. Guevara*, 598 F.2d 1094, 1100 (7th Cir. 1979). It is recommended that counsel suggest, and the military judge adopt, the practice of expressly stating the exceptions to the hearsay rule, though otherwise inapplicable, compared to which the proffered hearsay is “equivalent.” *See, e.g.*, *United States v. Thevis*, 84 F.R.D. 57, 65–70 (N.D. Ga. 1979). *See also* Saltzburg, Schinasi and Schlueter, *supra* note 24, at 366, where the authors observe:

In order to meet this burden, the proponent will have to address and satisfy each element of the Rule. This is an affirmative obligation; it cannot be satisfied by a general plea for admission. Because paragraph (24) contains so many variables, we believe that without special findings, an appellate court cannot determine whether the trial bench properly evaluated the issues before it. Evidence which may be admissible under this provision is by definition unusual. It does not fit within this Rule’s other 23 exceptions; nor does it fit the various exemptions in 801 or the exceptions in 804. As a result, a decision admitting or rejecting the evidence should be accompanied by a reasoned explanation, particularly because the trial bench must simultaneously consider not only the various requirements of the Rule, but also the “interests of justice” and the “general purposes of these rules.”

⁸⁵ *United States v. Fredericks*, 599 F.2d 262, 265 (8th Cir. 1979); *United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

⁸⁶ *Wilson v. Leonard Tire Co.*, 559 P.2d 1201 (N.M. Ct. App. 1976), *cert. denied*, 558 P.2d 621 (N.M. Sup. Ct. 1977).

⁸⁷ *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979).

tions.”⁸⁸ No mention was made of Rule 803(24) or Rule 804(b)(5). On appeal, the Seventh Circuit noted:

In reviewing a ruling made in the exercise of the trial court’s discretion, we are greatly aided when the record contains a statement of the reasons for the ruling and any findings made under Rule 104(a) on preliminary questions of fact relevant to admissibility. Here nothing of this sort is available. Although the defendant relied on the residual exception, it was not mentioned in the court’s explanation of its ruling excluding the evidence. Under these circumstances, we have little choice except to attempt to replicate the exercise of discretion that would be made by a trial judge in making the ruling.⁸⁹

Because the record was so inadequate, the Court of Appeals remanded the case to the trial court, directing it to make specific findings as to the trustworthiness of the hearsay.⁹⁰

III. C. THE ARTICLE 39(a) SESSION

Given the notice requirements of the residual hearsay exceptions and the need of the trial court to make specific findings, a pretrial hearing in accordance with Article 39(a), U.C.M.J., is ideally suited to enable the Government, the accused, and the military judge to make the necessary **record**.⁹¹ Under ideal circumstances the proponent of the residual hearsay should give notice of his intent to rely on Rule 803(24) or 804(b)(5), or both, as his theory of admissibility well before trial. To insure that the military judge has an **opportunity** to make necessary findings, the proponent should request an Article 39(a) session sometime prior to trial.

⁸⁸ *Id.* at 291.

⁸⁹ *Id.* at 291–92, 293. *See also* DeMars v. Equitable Life Assurance Soc., 610 F.2d 55, 61 (1st Cir. 1979); United States v. Palacios, 556 F.2d 1359, 1363 note 7 (5th Cir. 1977).

⁹⁰ Huff v. White Motor Corp., 609 F.2d 286, 294 (7th Cir. 1979); DeMars v. Equitable Life Assurance Soc., 610 F.2d 56, 61 (1st Cir. 1979). *See also* United States v. McLennon, 563 F.2d 943, 948 (9th Cir. 1977); United States v. Hinkson, 632 F.2d 382, 385 (7th Cir. 1980). *See generally* note 245, *infra*.

⁹¹ Article 39(a), U.C.M.J.; 10 U.S.C. 839(a).

If the military judge should admit the proffered hearsay, the opponent of that evidence will then have an opportunity to prepare accordingly without need of a last-minute continuance. Likewise, if the military judge decides to exclude the proffered evidence, the unsuccessful proponent can adjust his trial strategy in light of that ruling. If the proponent does not request an Article 39(a) session in connection with his intended use of the hearsay, the opponent of the hearsay evidence should request the hearing to present evidence and arguments relevant to the military judge's determination of admissibility. If the accused opposes evidence offered by the prosecution, he may also wish to move to suppress.⁹²

Even if the military judge should rule that proffered hearsay is admissible under one or both of the residual exceptions, the relevance of that evidence may still depend on the fulfillment of other facts or conditions. The military judge may therefore admit the hearsay conditionally, or even withhold ruling altogether in accordance with Military Rule 104(b). Furthermore, even if the military judge rules definitively at an Article 39(a) session that proffered hearsay is admissible, additional evidence offered at trial by either party may affect the soundness of that ruling. If, for example, it later appears that other evidence equally probative of the same point is available, the military judge might have to reconsider his prior finding pursuant to Rule 803(24)(B) or 804(b)(5)(B) that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."⁹³ Even more likely is the possibility that other evidence may arise which significantly affects the trustworthiness of the proffered hearsay,⁹⁴ or the unavailability of the declarant.⁹⁵ If such

⁹²Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 69A.

⁹³Rule 803(24), M.R.E.; Rule 804(b)(5), M.R.E. See Saltzburg and Redden (Cum. Supp. 1981), *supra* note 55, at 262, where the authors state, "the language of subsection (B) suggests that it applies at the time of trial rather than in advance of trial."

⁹⁴See, e.g., United States v. Balano, 618 F.2d 624, 630 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980). In United States v. Thevis, 84 F.R.D. 57, 73 (N.D. Ga. 1979), the court agreed before trial to review its ruling admitting the hearsay at the close of the case. The court noted that, if its finding of the defendant's waiver of his confrontation rights was no longer supported by "clear and convincing evidence," it would strike the statements and give "other appropriate relief as necessary." *Id.*

evidence first comes to light after a court with members has heard the residual hearsay offered by the prosecution, trial defense counsel should seriously consider a motion for mistrial.⁹⁶

Counsel and the military judge should therefore be alert to the possibility that the initial Article 39(a) session may not be dispositive of the issue at the trial court level.⁹⁷ Since the requirements of the residual exceptions apply, at least arguably, at the time of trial,⁹⁸ the military judge should reaffirm his earlier ruling admitting or excluding the residual hearsay at the beginning of trial and at the close of the evidence. If additional factors become known, specific findings should be made, as appropriate.

IV. SUBSTANTIVE REQUIREMENTS

As noted above, a military judge must make findings concerning the quality of the hearsay before it can be admitted under Rule 803(24) or Rule 804(b)(5). The courts frequently cite anywhere from three to six "requirements" that hearsay must meet to qualify for admission under the residual exceptions.⁹⁹ Some courts also tend to

⁹⁵ See, e.g., *Perricone v. Kansas City Southern Ry. Co.*, 630 F.2d 317, 321 (5th Cir. 1980).

⁹⁶ The merits of a motion for mistrial in this situation are beyond the scope of this paper. Nevertheless, certain questions immediately come to mind. Who adduced the subsequent evidence casting doubt on the admissibility of the residual hearsay, and does that have any bearing on the necessity for mistrial? If the military judge's prior finding of trustworthiness is affected by subsequent evidence, is it sufficient merely to instruct the members that they are the judges of credibility and may attach whatever weight they feel is desired to the hearsay? Is an instruction that the members should disregard the residual hearsay required? Is that sufficient to protect the rights of the accused? To a large extent the answers to these questions depend on the precise facts of a given case. To minimize the chances of a mistrial the trial counsel might well be advised to withhold presentation of this residual hearsay evidence until the close of his case.

⁹⁷ For an excellent example of how a trial court can resolve the admissibility of residual hearsay evidence in pretrial hearings, see *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980).

⁹⁸ See *Saltzburg and Redden* (Cum. Supp. 1981), *supra* note 55, at 262.

⁹⁹ Three courts have noted that Rule 804(b)(5) has six requirements: (1) the declarant must be unavailable; (2) the statement must have circumstantial

consider compatibility with the confrontation clause of the sixth amendment an additional "requirement," while others find the issue implicitly contained in the other "requirements."¹⁰⁰ While the issue is largely one of semantics, for purposes of analysis four substantive requirements will be considered below: trustworthiness equivalent to other recognized exceptions to the hearsay rule; materiality; probative value greater than that of other evidence; and serving the interests of justice. The requirement of the confrontation clause and Rule 804(b)(5) that the declarant be unavailable is considered in Section V, below.

IV. A. *EQUAL ENT CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS*

The most frequently litigated issue in connection with residual hearsay is the requirement that the proffered hearsay be "a statement not specifically covered by any of the foregoing exceptions but

guarantees of trustworthiness equivalent to other exceptions; (3) the statement must be offered as evidence of a material fact; (4) the statement must be more probative on the point for which it is offered than any other evidence that the proponent reasonably can procure; (5) introduction of the statement must serve the interests of justice and the purposes of the Federal Rules; and (6) the proponent of the evidence must give the required notice. *See, e.g.*, *United States v. Bailey*, 581 F.2d 341, 346 (3rd Cir. 1978); *United States v. Thevis*, 84 F.R.D. 57, 62 (N.D. Ga. 1979); *United States v. Turner*, 475 F. Supp. 194, 200 (E.D. Mich. 1978).

Similarly, two courts have noted that Rule 803(24) has five requirements, i.e., the same as those of Rule 804(b)(5) but without the requirement of an unavailable declarant. *United States v. Mandel*, 591 F.2d 1347, 1368, *vacated*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 109 (1981); *United States v. Mathis*, 559 F.2d 294, 298 (5th Cir.), *cert. denied*, 429 U.S. 1107 (1977). In *Lowery v. Maryland*, 401 F. Supp. 604, 608 (D. Md. 1975), *aff'd*, 532 F.2d 750 (4th Cir.), *cert. denied*, 429 U.S. 919 (1976), the court noted only four requirements. In *United States v. Bailey*, 439 F. Supp. 1303, 1306 (W.D. Pa. 1977), *rev'd*, 581 F.2d 341 (3rd Cir. 1978), the court counted only three requirements. While the number is merely a matter of semantics, the variations described by the courts can cause confusion.

¹⁰⁰*Compare* *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) *with* *United States v. Thevis*, 84 F.R.D. 57, 70 (N.D. Ga. 1979) (confrontation clause incorporated in Rule 804(b)(5)).

having equivalent circumstantial guarantees of trustworthiness.”¹⁰¹ There is no “acid test” of trustworthiness; rather, the courts have considered numerous factors in the context of widely varied factual settings. At the outset, if the proffered hearsay is “covered” by another exception to the hearsay rule, that other exception should govern its admissibility, rather than the residual exception. In theory, at least, the use of the residual exceptions is “preconditioned” on the nonexistence of another exception specifically covering the hearsay.¹⁰² One district court has remarked that “it is unlikely that Congress meant this exception to be used to circumvent its own restriction of another exception.”¹⁰³ It appears, however, that many courts consider that hearsay arguably admissible under one of the “recognized” hearsay exceptions, but which the court specifically finds to be inadmissible under such exception, may still be admitted under one of the residual exceptions.¹⁰⁴ One federal district court has observed that:

the starting point for this analysis is to evaluate the inherent circumstantial guarantees of trustworthiness possessed by the bench mark exceptions, so that the standard against which the proffered statements are to be measured may be determined. . .

The hallmark of these generic exceptions to the hearsay rule is that each is considered to have greater reliability

¹⁰¹ Rule 803(24), M.R.E.; Rule 804(b)(5), M.R.E.

¹⁰² *Electroglas, Inc. v. Dynatex Corp.*, 492 F. Supp. 97, 102 (N.D. Cal. 1980); *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981); *United States v. Turner*, 475 F. Supp. 194, 199 (E.D. Mich. 1978); *Wolfson v. Mutual Life Ins. Co. of New York*, 455 F. Supp. 82, 88 (M.D. Pa.), *affd.*, 588 F.2d 825 (3rd Cir. 1978); *In re IBM Peripheral EDP Devices*, 444 F. Supp. 110, 113 (N.D. Cal. 1978); *Lowery v. Maryland*, 401 F. Supp. 604, 608 (D. Md. 1975), *affd.*, 532 F.2d 750 (4th Cir.), *cert. denied*, 429 U.S. 919 (1976).

¹⁰³ *In re IBM Peripheral EDP Devices*, 444 F. Supp. 110, 113 (N.D. Cal. 1978).

¹⁰⁴ *United States v. Turner*, 475 F. Supp. 194, 199 (E.D. Mich. 1978). *See also* *United States v. Iaconetti*, 406 F. Supp. 554, 559 (E.D.N.Y. 1976), *affd.*, 540 F.2d 574 (2nd Cir. 1976); *Turbyfill v. International Harvester Co.*, 486 F. Supp. 232, 234–35 (E.D. Mich. 1980). This is particularly true with respect to Rule 803(1) and 803(6), F.R.E. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981).

than that possessed by ordinary hearsay. As Judge Mansfield noted in his dissenting opinion in *United States v. Medico*, . . . "The foundation for all hearsay exceptions is circumstantial trustworthiness in the absence of cross-examination."¹⁰⁵

Moreover, one court has noted that the "circumstantial guarantees of trustworthiness . . . are those that existed at the time the statement was made and do not include those that may be added by using hindsight."¹⁰⁶ The Official Analysis to Military Rule 803(24) has suggested the following approach:

In any given case, both trial and defense counsel may wish to examine the hearsay evidence in question to determine how well it relates to the four traditional considerations usually invoked to exclude hearsay testimony: how truthful was the original declarant? to what extent were his or her powers of observation adequate? was the declaration truthful? was the original declarant able to adequately communicate the statement? Measuring evidence against this framework should assist in determining the reliability of the evidence. Rule 804(24) itself requires the necessity which is the other usual justification for hearsay exceptions.¹⁰⁷

To determine "circumstantial guarantees of trustworthiness," the federal courts have also considered similar factors:

1. *Oaths*. An obvious starting point in the search for trustworthiness is whether or not the hearsay statement was made under oath. One court has observed, "[i]t is fundamental to our system of justice 'that men should not be allowed to be convicted on the basis of

¹⁰⁵ *United States v. Thevis*, 84 F.R.D 57, 62-63 (N.D. Ga. 1979).

¹⁰⁶ *Huff v. White Motor Corp.* 609 F.2d 286, 292 (7th Cir. 1979). It should be noted, however, that the Seventh Circuit does not consider corroborating evidence in determining trustworthiness. *Id.* at 293. There are also other factors arising after the statement is made which may be relevant to the determination of trustworthiness, notwithstanding the Seventh Circuit's position to the contrary.

¹⁰⁷ Analysis, 1980, MCM, *supra* note 9, at CCX-CCXI.

unsworn testimony.’”¹⁰⁸ The presence or absence of an oath, however, is never dispositive of the issue in itself. The Eighth Circuit has cited the existence of an oath as one of the indicia of trustworthiness which it considered in finding a hearsay statement (grand jury testimony) admissible.¹⁰⁹ In other instances the same court cited the absence of an oath in finding proffered hearsay untrustworthy.¹¹⁰

The Third Circuit has also cited the unsworn nature of the hearsay before it in finding a lack of trustworthiness.¹¹¹ Similarly, the Fifth Circuit found hearsay statements made in a government claim form trustworthy partly because the declarant was aware he could be prosecuted for false statements when he signed the form, since “like an oath subjecting an affiant to the penalty of perjury, it tends to impress upon the declarant the seriousness of the statement and the importance of telling the truth.”¹¹²

This may be true even if the declarant was granted immunity before a grand jury, as he would have a “strong motive to testify truthfully,” because only untruthful testimony could subject him to criminal liability.¹¹³ The value of an oath as evidence of trustworthiness, however, is fragile. The Fifth Circuit, in a different case, found that “the fact that the witness was under oath, and subject to the penalties of perjury, loses any significance it might have” in view of Government threats that he might be jailed for contempt if

¹⁰⁸ *United States v. Love*, 592 F.2d 1022, 1026 note 9 (6th Cir. 1979). *quoting* *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975).

¹⁰⁹ *United States v. Carlson*, 547 F.2d 1346, 1350 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). *See also* *Furtado v. Bishop*, 604 F.2d 80, 91 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

¹¹⁰ *United States v. Fredericks*, 599 F.2d 262, 265 (8th Cir. 1979); *United States v. Love*, 592 F.2d 1022, 1024 (8th Cir. 1979).

¹¹¹ *United States v. Bailey*, 581 F.2d 341, 350 (3rd Cir. 1978).

¹¹² *United States v. White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980).

¹¹³ *United States v. Thevis*, 84 F.R.D. 57, 65 (N.D. Ga. 1979). The declarant's hearsay statement was, of course, sworn. *Id.*

he did not testify.¹¹⁴ Similarly, the sworn nature of the statement may be "of negligible significance" if the declarant attempted to curry favor with the Government.¹¹⁵

The Sixth Circuit has even completely rejected, in one instance, the suggestion that an oath makes hearsay more reliable because, in the absence of cross-examination, the motivation of the declarant cannot be explored.¹¹⁶ Indeed, the existence of an oath can even have a negative effect. In *United States v. Garner*,¹¹⁷ one Robinson gave sworn testimony before a grand jury implicating the defendant. At trial he refused to testify, other than to say under oath that his sworn grand jury testimony was false. The witness' grand jury testimony was nevertheless admitted under Rule 804(b)(5). The defendant was convicted, and on appeal the Fourth Circuit found the grand jury testimony to be sufficiently trustworthy because of its extensive corroboration. Although the Supreme Court denied a writ of certiorari, Mr. Justice Stewart, joined by Mr. Justice Marshall, dissented, stating:

The only factor that generally makes grand-jury testimony more trustworthy than other out-of-court statements is the fact that it is given under oath. The witnesses speak under the threat of prosecution for material false statements. But that usual indication of trustworthiness was missing here. Robinson recanted his grand-jury testimony at the trial. By disclaiming under oath his earlier sworn statements, he put himself in a position where one of his two sworn statements had to be false.¹¹⁸

¹¹⁴*United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977).

¹¹⁵*United States v. Turner*, 475 F. Supp. 194, 201 (E.D. Mich. 1978). *But cf.* *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978); *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979), where persons who had "curried favor with the government" were found to be reliable.

¹¹⁶*United States v. Marks*, 585 F.2d 164, 168 (6th Cir. 1978).

¹¹⁷574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333 (1978).

¹¹⁸99 S. Ct. at 335.

Similarly, in *State v. Maestas*,¹¹⁹ the New Mexico Court of Appeals noted:

The instant case proves the insignificance of an oath. The victim testified under oath that she could not answer and did not know who beat her, even though she could answer and did know. This disrespect for the oath makes her non-oath prior trustworthy statements to witnesses fairly soon after the events occurred take on a greater semblance of truth.¹²⁰

Judicial recognition of the fragility of the oath is perhaps best demonstrated by the fact that unsworn hearsay statements are frequently admitted under the residual hearsay exceptions, often without any discussion of their unsworn nature.¹²¹

2. *Declarant's motivation.* As noted above, the penalty of perjury is a legitimate factor to consider in evaluating the trustworthiness of sworn hearsay, although its theoretical power to compel the truth is often illusory.¹²² Similarly, if the hearsay statement is contrary to the declarant's pecuniary interest,¹²³ or penal interest,¹²⁴ or

¹¹⁹ 584 P.2d 182 (N.M. Ct. App. 1978).

¹²⁰ *Id.* at 190.

¹²¹ See, e.g., *United States v. Friedman*, 593 F.2d 109 (9th Cir. 1979); *Coppenveld Steel v. Demag*, 578 F.2d 953 (3rd Cir. 1978); *United States v. Lyon*, 567 F. 777 (8th Cir. 1977), cert. denied, 435 U.S. 918 (1978); *United States v. Medico*, 557 F.2d 309 (2nd Cir.), cert. denied, 434 U.S. 986 (1977); *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976); *United States v. Iaconetti*, 540 F.2d 574 (2nd Cir. 1976); *Turbyfill v. International Harvester Co.*, 486 F. Supp. 232 (E.D. Mich. 1980); *United States v. American Cyanamid Corp.*, 427 F. Supp. 859 (S.D.N.Y. 1977).

¹²² See generally, *United States v. White*, 611 F.2d 531 (5th Cir.), cert. denied, 100 S. Ct. 2978 (1980); *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979); *United States v. Turner*, 475 F. Supp. 194 (E.D. Mich. 1980).

¹²³ *Huff v. White Motor Corp.*, 609 F.2d 286, 293 (7th Cir. 1979); *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979). Statements against the declarant's pecuniary interest may also be admissible under Rule 804(b)(3), M.R.E. If so, it is questionable if admission of the hearsay under the residual hearsay exceptions is appropriate. See *United States v. Turner*, 475 F. Supp. 194 (E.D. Mich. 1978).

¹²⁴ *United States v. Hinkson*, 632 F.2d 382, 386 (4th Cir. 1980).

might subject him to impeachment in a pending civil case, such facts can evidence a motive to testify truthfully.¹²⁵ Some courts have cited the absence of any motive to testify falsely, rather the presence of an affirmative motive to testify truthfully, as indicative of truthfulness.¹²⁶

More frequently, however, motives to falsify are cited as indicia of untrustworthiness. A personal or intimate relationship of the declarant with a defendant offering the hearsay statement may constitute a possible motive to give a "version" more favorable to the defendant.¹²⁷ Conversely, if the declarant is a long-time enemy of the defendant against whom the hearsay is offered, trustworthiness may be found lacking.¹²⁸ If the declarant was attempting to curry favor with the Government at the time the statement in question was made, "serious doubt" may be cast upon the statement's reliability.¹²⁹ This may be particularly true if the declarant was then negotiating for a reduction in charges.¹³⁰ A classic example of such hearsay is found in *United States v. Gonzalez*,¹³¹ wherein the Government offered the grand jury testimony of an unavailable witness pursuant to Rule 804(b)(5). The Fifth Circuit found the hearsay untrustworthy because, *inter alia*, (1) "the pressure of the prosecutor and the members of the grand jury on the witness was such that

¹²⁵ *United States v. Thevis*, 84 F.R.D. 57, 65 (N.D. Ga. 1979).

¹²⁶ See, e.g., *United States v. White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980); *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979); *Furtado v. Bishop*, 604 F.2d 80, 91 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979); *State Farm v. Gudmunson*, 495 F. Supp. 794, 796 note 1 (D. Mont. 1980); *State v. Maestas*, 584 P.2d 182, 189 (N.M. Ct. App. 1978).

¹²⁷ *United States v. Fredericks*, 599 F.2d 262, 265 (8th Cir. 1979).

¹²⁸ *United States v. Mandel*, 591 F.2d 1347, 1369, *vacated*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

¹²⁹ *United States v. Turner*, 475 F. Supp. 194, 201 (E.D. Mich. 1978). See also *United States v. Bailey*, 581 F.2d 341, 345-46 note 4 (3rd Cir. 1978).

¹³⁰ *United States v. Love*, 592 F.2d 1022, 1026 (8th Cir. 1979); *United States v. Bailey*, 581 F.2d 341, 350 (3rd Cir. 1978).

¹³¹ 559 F.2d 1271 (5th Cir. 1978).

it was incumbent upon him to come up with an answer, whether or not it was true;” (2) the witness was repeatedly threatened with contempt if he did not testify; and (3) his fear of physical harm to him and his family, if he told the truth, gave him “some incentive not to tell the truth.”¹³²

The existence of a motive to falsify, however, should not automatically be assumed simply because the declarant is cooperating with the Government. The Fifth Circuit in *United States v. Leslie*,¹³³ also noted:

It is true that all three declarants suggested that they were motivated to make the statements by the hope that their charges would receive more favorable treatment. However, the motive arose only from a general hope, not from any specific “deal” the government made. There may be cases where government inducements to obtain statements strongly suggest unreliability, but in light of the other circumstances here and the vagueness of the alleged inducement, this is not such a case.¹³⁴

Moreover, even if the declarant has a motive to “conjure up a story,” corroboration of the statement may supply “equivalent circumstantial guarantees of trustworthiness.”¹³⁵

Several courts have found hearsay statements sufficiently trustworthy even though the declarant was a paid informant,¹³⁶ was im-

¹³²*Id.* at 1273. The court never explained why fear of the defendant would lead the witness to incriminate him in the hearsay statement. Logic would seem to dictate that such fear would result in a story falsely exculpating the defendant. Had the defendant offered an exculpatory statement by the same witness, the “fear” factor might then be significant to a determination of its trustworthiness.

¹³³542 F.2d 285 (5th Cir. 1976).

¹³⁴*Id.* at 291.

¹³⁵*United States v. Ward*, 552 F.2d 1080, 1083 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977).

¹³⁶*United States v. West*, 574 F.2d 1131 (4th Cir. 1978).

munized,¹³⁷ had a criminal record,¹³⁸ was an accomplice of the defendant,¹³⁹ had previously bargained with the Government for outrageous concessions,¹⁴⁰ had a history of mental instability,¹⁴¹ had entered into a plea agreement,¹⁴² or did not have a "great respect for the truth when it did not serve his purposes."¹⁴³ In *United States v. Thevis*,¹⁴⁴ the declarant possessed almost all the foregoing impeaching characteristics, yet his statement was found to be trustworthy because of various other factors.

3. *Corroboration.* The Seventh Circuit has held that corroboration of the hearsay statement is not relevant to its trustworthiness. "Because the presence or absence of corroborative evidence is irrelevant in the case of a specific exception, it is irrelevant here, where the guarantees of trustworthiness must be equivalent to those supporting specific exceptions."¹⁴⁵ Other courts, however, have looked to corroboration of the statement as a legitimate indicium of reliability. The Fourth Circuit has done so without qualification, finding that tape-recorded conversations, surveillances, photographs, and expert witnesses which corroborate the incriminating aspects of the declarant's statement give "a degree of trustworthiness probably exceeding that inherent in dying declarations, statements against

¹³⁷ *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979). Compare *Thevis* with *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977).

¹³⁸ *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980); *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333 (1978); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979).

¹³⁹ *Id.*

¹⁴⁰ *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979).

¹⁴¹ *Id.*

¹⁴² *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333 (1978).

¹⁴³ *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979).

¹⁴⁴ *Id.*

¹⁴⁵ *Huff v. White Motor Corp.*, 609 F.2d 286, 293 (7th Cir. 1979).

interest, and statements of personal or family history, all of which are routinely admitted under § 804(b)(2), (3), and (4)."¹⁴⁶

Documentary evidence can also provide sufficient corroboration to establish trustworthiness, at least in the Fourth Circuit.¹⁴⁷ The Fifth Circuit has expressed a similar view, finding oral testimony sufficient corroboration to satisfy the trustworthiness requirement of the residual exceptions.¹⁴⁸ One district court has utilized a "two part analysis" of circumstantial guarantees of trustworthiness. The first step consists of analyzing the declarant and the circumstances surrounding the statement, while the second part requires consideration of corroborating evidence.¹⁴⁹ Another district court, however, will consider only that evidence which corroborates the incriminating portions of the proffered evidence. Mere corroboration of the declarant's veracity is not sufficient.¹⁵⁰ The Third Circuit has similarly indicated that the existence of isolated facts corroborating the hearsay is insufficient to establish trustworthiness.¹⁵¹

4. Fact v. Conjecture. A paramount consideration in determining trustworthiness is the factual nature of the hearsay. The statement should be "unambiguous and explicit" and contain "neither opinion nor speculation."¹⁵² In *United States v. Mandel*,¹⁵³ the Fourth Cir-

¹⁴⁶ *United States v. West*, 574 F.2d 1131, 1135 (4th Cir. 1978). See also *United States v. Hinkson*, 632 F.2d 382, 386 (4th Cir. 1980); *United States v. Garner*, 574 F.2d 1141, 1146 (4th Cir.), cert. denied, 99 S. Ct. 333 (1978).

"*United States v. Garner*, 574 F.2d 1141, 1146 (4th Cir.), cert. denied, 99 S. Ct. 333 (1978) (Justices Stewart and Marshall dissenting).

¹⁴⁸ *United States v. Ward*, 552 F.2d 1080, 1083 (5th Cir.), cert. denied, 434 U.S. 850 (1977).

¹⁴⁹ *United States v. Thevis*, 84 F.R.D. 57, 63-68 (N.D. Ga. 1979).

¹⁵⁰ *United States v. Turner*, 475 F. Supp. 194, 202 (E.D. Mich. 1978).

¹⁵¹ *United States v. Bailey*, 581 F.2d 341, 349 (3rd Cir. 1978).

¹⁵² *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979). See also *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979); *State Farm v. Gudmunson*, 495 F. Supp. 794, 796 note 1 (D. Mont. 1980); *State v. Maestas*, 584 P.2d 182, 184 (N.M. Ct. App. 1978).

¹⁵³ 591 F.2d 1347, vacated, 602 F.2d 653 (4th Cir. 1979), cert. denied, 100 S. Ct. 1647 (1980).

cuit found untrustworthy alleged hearsay statements made by unidentified persons concerning Maryland Governor Mandel's political positions. The court noted:

We are not dealing with an objectively observable factual event. We are dealing with circumstantial proof. . . Evidence based on rumors and general discussions is the worst type of hearsay. Such testimony, especially from unidentified declarants, does not possess the requisite guarantees of trustworthiness to justify a new exception to the hearsay rule.¹⁵⁴

In evaluating the factual sufficiency of the proffered hearsay, great weight is attached to the amount of detail in the statement. One district court found a highly detailed statement trustworthy, noting: "[t]he statements bespeak their own authenticity; each is replete with the detail to which only a participant and confidante would have access."¹⁵⁵ If, however, the statement was developed though the use of leading questions which "might possibly distort the truth of the answers," its trustworthiness might be called into question.¹⁵⁶ The form of a statement, however, can also be a positive consideration. Statements that are recorded and accurately transcribed may "boost their own credibility."¹⁵⁷

5. *Verification by the declarant.* A hearsay statement which, on its face, may lack sufficient circumstantial guarantees of trustworthiness may nevertheless be admitted if its authenticity is somehow verified by the declarant. Such verification is most needed when the statement is actually prepared by another person. One district court declined to admit such a statement under Federal Rule 804(b)(5), stating:

¹⁵⁴*Id.* at 1369.

¹⁵⁵ *United States v. Thevis*, 84 F.R.D. 57, 65 (N.D. Ga. 1979). See also *United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977).

¹⁵⁶ *United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977); *Turbyfill v. International Harvester Co.*, 486 F. Supp. 232, 234 (E.D. Mich. 1980). See also *United States v. Garner*, 99 S. Ct. 333, 335 (1978) (denial of certiorari). But cf. *Huff v. White Motor Corp.*, 609 F.2d 286, 293 (7th Cir. 1979).

¹⁵⁷ *United States v. Thevis*, 84 F.R.D. 57, 65 (N.D. Ga. 1979).

The Court would further note that Mr. Stratton's unsworn statement appears not to have been written out by him but rather signed by him after transcription by another. The Court is well aware of the subtle shifts in meaning that can occur when one's statement is recorded by another. Such changes can be wholly unintentional, and without impugning at all the integrity of the attorney who took Mr. Stratton's statement, he was hardly a disinterested observer. The lawyer took that statement for the purpose of accident investigation with an eye towards litigation.¹⁵⁸

Obviously, written statements taken by military police or CID investigators are subject to similar limitations. The trustworthiness of such statements, however, may be enhanced if the declarant makes handwritten alterations on the document, thereby indicating that he carefully read the statement to insure its accuracy.¹⁵⁹ The declarant may also verify the accuracy of his statement in person at a pretrial hearing or at trial.¹⁶⁰ Similarly, even if the declarant does not verify his own statement, a person who helped prepare the statement may be able to establish its trustworthiness.¹⁶¹ This is particularly true if the trial witness who prepared the statement has personal knowledge of some of the facts contained in the statement and its accuracy.¹⁶² Moreover, the failure of the declarant to

¹⁵⁸ *Workman v. Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562, 564 (N.D. Ohio 1975).

¹⁵⁹ *United States v. Williams*, 573 F.2d 284, 288 (5th Cir. 1978). See also *Turbyfill v. International Harvester Co.*, 486 F. Supp. 232, 235 (E.D. Mich. 1980); *Coppenveld Steel v. Demag*, 578 F.2d 953, 964 (3rd Cir. 1978).

¹⁶⁰ *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980); *United States v. Gonzalez*, 559 F.2d 1271, 1274 (5th Cir. 1977); *United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. Leslie*, 542 F.2d 285, 290 (5th Cir. 1976). Compare *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333, 335 (1978), where two justices dissented from a denial of certiorari, partly with respect to this issue.

¹⁶¹ *United States v. White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980); *United States v. Lyon*, 567 F.2d 777, 784 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978).

¹⁶² *United States v. White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980). See also *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979),

recant his statement may itself be one indicium of its reliability.¹⁶³ If, however, the declarant later denies having made the statement, such fact may reflect adversely on the trustworthiness of the hearsay.¹⁶⁴ Hearsay can also be verified, if not by the declarant or the person taking the statement, by other persons who checked the declarant's accuracy on various points contained in the statement.¹⁶⁵ Ambiguous records otherwise inadmissible as hearsay, may be admissible if a witness testifies as to their meaning.¹⁶⁶

cert. denied, 101 S. Ct. 118 (1980). *But see* *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979) where the court stated:

In our view however, the reliability of the witness' testimony that the hearsay statement was in fact made is not a factor to be considered in deciding its admissibility . . . But, as we have already noted, the circumstantial guarantees of trustworthiness necessary under the residual exception are to be "equivalent" to the guarantees that justify the specific exceptions. Those guarantees relate solely to the trustworthiness of the hearsay statement itself. . . . the specific exceptions to the hearsay rule are not justified by any circumstantial guarantee that the witness who reports the statement will do so accurately and truthfully. That witness can be cross-examined and his credibility thus tested in the same way as that of any other witness. It is the hearsay declarant, not the witness who reports the hearsay, who cannot be cross-examined. Therefore, although we do not think [the witness'] testimony would fail a reliability test, that test is not to be applied by the court but by the jury, as with any other witness.

Id. at 293.

¹⁶³*United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). *But see* *United States v. Balano*, 618 F.2d 624, 629 note 10 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980).

¹⁶⁴*United States v. Hinkson*, 632 F.2d 382, 386 (4th Cir. 1980). *But cf.* *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980) (recantation of statements establishing waiver of confrontation rights); *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333 (1978) (recantation of proffered hearsay statement itself.)

¹⁶⁵*United States v. West*, 574 F.2d 1131 (4th Cir. 1978).

¹⁶⁶*United States v. Anderson*, 618 F.2d 487, 491 (8th Cir. 1980). *See also* *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979); *United States v. Ratliff*, 623 F.2d 1293, 1296 (8th Cir. 1980); *United States v. White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980), where witnesses "summarized" such records.

6. Personal knowledge of the declarant. The courts have consistently required that the declarant have personal or firsthand knowledge of the events related in the hearsay statement so that there is “no reliance upon potentially erroneous secondary information and possibility of faulty recollection [is] minimized.”¹⁶⁷ If the source of the declarant’s knowledge is, therefore, unidentified, the court may find the statement lacks trustworthiness.¹⁶⁸ If, however, the declarant himself is unidentified but was known to have had firsthand knowledge of the facts contained in his statement, the hearsay may still be found trustworthy.¹⁶⁹ The proponent of the residual hearsay should therefore lay a foundation showing the basis of the declarant’s knowledge.¹⁷⁰

7. Proximity in time. The courts have also considered the proximity of the hearsay statement to the events in question when assessing its trustworthiness. Statements made contemporaneously with the event,¹⁷¹ a few hours later,¹⁷² on the afternoon following the event,¹⁷³ or within twenty-four hours of the event,¹⁷⁴ possess a higher degree of trustworthiness than statements made at a later point in time. Statements “made close on the heels of a criminal event and to persons with whom it was appropriate and even neces-

¹⁶⁷United States v. Carlson, 547 F.2d 1146, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). *See also* Furtado v. Bishop, 604 F.2d 80, 91 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

¹⁶⁸*See, e.g.*, United States v. Thevis, 84 F.R.D. 57, 67–68 (N.D. Ga. 1979).

¹⁶⁹United States v. Mandel, 591 F.2d 1347, 1369, *vacated*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980); United States v. Medico, 557 F.2d 315 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977).

¹⁷⁰Wilson v. Leonard Tire Co., 559 P.2d 1201 (N.M. Ct. App. 1976), *cert. denied*, 558 P.2d 621 (N.M. Sup. Ct. 1977).

¹⁷¹United States v. Medico, 557 F.2d 309, 315 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977).

¹⁷²United States v. Leslie, 542 F.2d 285, 290 (5th Cir. 1976).

¹⁷³Turbyfill v. International Harvester Co., 486 F. Supp. 232, 234 (E.D. Mich. 1980).

¹⁷⁴State v. Maestas, 584 P.2d 182, 189 (N.M. Ct. App. 1978).

sary to communicate would seem to mitigate the risks of insincerity and faulty memory.”¹⁷⁵

Even a statement made three months following an event described therein has been found trustworthy by the Fifth Circuit, which noted that “the length of time between an event and the declarant’s statement concerning it is a significant indicator of reliability.”¹⁷⁶ The Fifth Circuit has also suggested that a hearsay statement may be trustworthy because it was “made closer in time to the actual event than was the trial testimony.”¹⁷⁷ The First Circuit, however, has observed that a hearsay statement made eight and one-half months following the event it described could have been “questioned,” although it nevertheless found the statement trustworthy.¹⁷⁸ In other instances, however, statements made as long as four years after the incident described have been found trustworthy without discussion of the relative proximity in time.¹⁷⁹

8. *Reputation of the declarant.* On occasion the courts have noted the reputation of the declarant in assessing the trustworthiness of his statements. In a civil case the First Circuit found a hearsay statement of an “eminent attorney” to be trustworthy partly because he “was not a person likely to make a cavalier accusation.”¹⁸⁰ On the other hand, a district court once found trustworthy a hearsay statement of a declarant who did not “have great respect for the truth when it did not serve his purposes,” since other indicia of trustworthiness were present.¹⁸¹ Surprisingly, however, a state court would not consider a named declarant’s past record of reliabil-

¹⁷⁵ *United States v. Iaconetti*, 406 F. Supp. 554, 559 (E.D.N.Y. 1976).

¹⁷⁶ *United States v. White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980).

¹⁷⁷ *United States v. Williams*, 573 F.2d 284, 288 (5th Cir. 1978).

¹⁷⁸ *Furtado v. Bishop*, 604 F.2d 80, 91 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

¹⁷⁹ *See, e.g., United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980). This issue, however, was never raised in the district court.

¹⁸⁰ *Furtado v. Bishop*, 604 F.2d 80, 91 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

¹⁸¹ *United States v. Thevis*, 84 F.R.D. 57, 64 (N.D. Ga. 1979)

ity as an informant in assessing the trustworthiness of his statements.¹⁸²

9. *Cross-examination of the declarant.* Military Rule 601 provides that “[e]very person is competent to be a witness except as otherwise provided in these rules.”¹⁸³ The Seventh Circuit, in approving the admission of hearsay under the residual exceptions, has stated, with respect to Federal Rule 601 that:

all questions of a witness’ reliability are left to the jury. By analogy, so should the reliability of a declarant whose statement is offered under an exception to the hearsay rule. Even though the jurors will not be able to observe the declarant as they would a witness, they will ordinarily have before them the evidence on which the judge would determine the qualification question if it were his responsibility to do so.¹⁸⁴

Thus, the availability of the declarant for cross-examination at trial is not strictly essential to the admission of hearsay. Nevertheless, several appellate courts, in reviewing the admission of residual hearsay under Rule 803(24) for an abuse of discretion, have cited the subjection of the declarant to cross-examination at trial as one indicium of reliability justifying the admission of the hearsay.¹⁸⁵ The trustworthiness requirement applies, of course, to the declarant and not the witness who relates the hearsay statement in court.¹⁸⁶ Accordingly, the Fifth Circuit held in *United States v. Leslie*,¹⁸⁷ that the hearsay in question had “strong indicia of reliability” because:

¹⁸² *Maynard v. Commonwealth*, 558 S.W.2d 628, 634 (Ky. Ct. App. 1977).

¹⁸³ Rule 601, M.R.E. This rule is substantially similar to Federal Rule 601, except with respect to privileges.

¹⁸⁴ *Huff v. White Motor Corp.*, 604 F.2d 286, 293–94 note 12 (7th Cir. 1979).

¹⁸⁵ *United States v. Garner*, 574 F.2d 1141, 1146 (4th Cir.), cert. denied, 99 S. Ct. 333 (1978); *United States v. Williams*, 573 F.2d 284, 288 (5th Cir. 1978).

¹⁸⁶ See also *State Farm v. Gudmunson*, 495 F. Supp. 794, 796 note 1 (D. Minn. 1980).

¹⁸⁷ 542 F.2d 285 (5th Cir. 1976).

the declarants were available for cross-examination by the party against whom the statements were offered. Indeed, the declarants were given ample opportunity upon examination by both the government and the appellant's counsel to explain any errors in the statements. We agree with Judge Learned Hand's observation that when the jury decides the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court.¹⁸⁸

Predictably, the same court in *United States v. Gonzalez*¹⁸⁹ cited the absence of cross-examination of the hearsay declarant at the time the statement was made as one of the several factors that demonstrated insufficient "equivalent guarantees of trustworthiness."¹⁹⁰ One state court has held, however, that statements not subjected to cross-examination at the time they were made, may nevertheless be admitted at trial if the declarant is there subject to cross-examination.¹⁹¹ The absence of cross-examination of the declarant, however, either at the time the statement was made or at trial, does not necessarily preclude a finding of trustworthiness sufficient to satisfy Rule 803(24) or Rule 804(b)(5). Even the Fifth Circuit in *United States v. Ward*¹⁹² upheld the admission of a hearsay statement, the declarant of which was unavailable for cross-examination.¹⁹³ Other courts have similarly done so, although they

¹⁸⁸*Id.* at 290. *See also* *United States v. Garner*, 99 S. Ct. 333, 335 (1978) (denial of certiorari).

¹⁸⁹559 F.2d 1271 (5th Cir. 1977).

¹⁹⁰*Id.* at 1273. *See also* *United States v. Bailey*, 581 F.2d 341, 350 (3rd Cir. 1978); *State v. Maestas*, 584 P.2d 182, 190 (N.M. Ct. App. 1978). In *Bailey*, the defendant was even permitted to cross-examine the F.B.I. agent who heard the declarant's hearsay statement and in so doing substantially impeached the declarant. 581 F.2d at 345. In rejecting the hearsay, the Third and Fifth Circuits stated that their findings were predicated on the requirements of the residual exceptions, and did not expressly hold that the proffered statements violated the confrontation clause of the sixth amendment. *United States v. Bailey*, *supra*, at 351; *United States v. Gonzalez*, 559 F.2d 1271, 1274 (5th Cir. 1977).

¹⁹¹*State v. Maestas*, 584 P.2d 182, 190 (N.M. Ct. App. 1978).

¹⁹²552 F.2d 1080 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977).

¹⁹³*Id.* at 1083. *Ward* was decided before *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977), and *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976), and was

have not expressly held that cross-examination of the declarant was necessary.¹⁹⁴

The foregoing indicia of trustworthiness are, of course, not exhaustive. The authority of each reported case is almost necessarily limited to its own facts. Moreover, the ingenuity of counsel can, without doubt, always give rise to additional factors in the context of specific factual situations.

IV.B. EVIDENCE OF MATERIAL FACT

Both Military Rule 803(24)(A) and Military Rule 804(b)(5)(A) require the military judge to determine that "the statement is offered as evidence of a material fact" before it can be admitted.¹⁹⁵ The word "material" has been held to mean only that the proffered evidence is "relevant."¹⁹⁶ One district court has explained:

not cited as authority in either of the later decisions. Moreover, the *Ward* panel was comprised of judges different from those on the panels deciding *Gonzalez* and *Leslie*.

The latest ruling by the Fifth Circuit on this point is *United States v. White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 100 S. Ct. 2978 (1980), where hearsay records were admitted under Rule 803(24), F.R.E. The declarant was unavailable for cross-examination, although the court found the hearsay trustworthy because, in part, a witness who helped prepare the records did testify at trial and was subject to cross-examination. The continued validity of *Ward* in the Fifth Circuit is therefore questionable. *Cf. United States v. Mathis*, 559 F.2d 294, 298-99 (5th Cir.), *cert. denied*, 429 U.S. 1107 (1977).

¹⁹⁴*See, e.g., Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); *Copperweld Steel v. Demag*, 578 F.2d 953 (3rd Cir. 1978); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978); *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333 (1978); *United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978); *United States v. Medico*, 557 F.2d 309 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979); *United States v. American Cyanamid Corp.*, 427 F. Supp. 859 (S.D.N.Y. 1977). Arguably, the foregoing decisions reject by implication cross-examination of the declarant as a precondition to a finding of trustworthiness.

¹⁹⁵Rule 803(24) (A), M.R.E., Rule 804(b)(5)(A), M.R.E.

¹⁹⁶*Huff v. White Motor Corp.*, 609 F.2d 286, 294 (7th Cir. 1979); *United States v. American Cyanamid Corp.*, 427 F. Supp. 859, 865 (S.D.N.Y. 1977).

This requirement seems redundant since, if it did not tend to prove or disprove a material fact, the evidence would not be relevant and would not be admissible under rules 401 and 402. What is probably meant is that the exception should not be used for trivial or collateral matters.¹⁹⁷

Evidence may be "material" within the meaning of the residual exceptions even if its only significance is to partially corroborate other evidence.¹⁹⁸ Even hearsay evidence of "other crimes" offered pursuant to Federal Rule 404(b)¹⁹⁹ has been held to be admissible under the residual hearsay exceptions because "intent, knowledge, a common plan or scheme and the absence of mistake or accident" were material facts.²⁰⁰

¹⁹⁷ *United States v. Iaconetti*, 406 F. Supp. 554, 559 (E.D.N.Y.), *affd*, 540 F.2d 574 (2d Cir. 1976). On appeal, the Second Circuit noted, "the statements were relevant to a material proposition of fact in the case and they seemed to clarify what actually was said and intended . . ." 540 F.2d at 578.

Rule 401, M.R.E., which is identical to the corresponding federal rule, provides that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402, M.R.E., which is substantially similar to its federal counterpart, provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the Uniform Code of Military Justice, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

¹⁹⁸ *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979); *United States v. Iaconetti*, 540 F.2d 574, 578 (2d Cir. 1976).

¹⁹⁹ Rule 404(b), F.R.E., provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b), M.R.E., is identical to the federal rule.

²⁰⁰ *United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

IV.C. THE MOST PROBATIVE EVIDENCE

Both Military Rules 803(24)(B) and 804(b)(5)(B) further require that the military judge find that “the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.”²⁰¹ On its face, this language suggests this requirement applies at the time of trial and not simply at the time when notice is given, or when an Article 39(a) session is held to determine admissibility.²⁰² In *deMars v. Equitable Life Assurance Society*,²⁰³ the First Circuit cited Judge Weinstein’s treatise on evidence as “instructive on how Part (B) is to be construed”:

What is “reasonable” depends upon such matters as the importance of the evidence, the means at the command of the proponent and the amount in controversy. The good sense of the trial judge must be relied upon. It should not be necessary to scale the highest mountains of Tibet to obtain a deposition for use in a \$500 damage claim arising from an accident with a postal truck. Even though the evidence may be somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the “more probative” requirement can not [sic] be interpreted with cast iron rigidity.²⁰⁴

Some courts have held that subsection (B) of each of the residual exceptions requires that the declarant must in fact be unavailable to testify, since the declarant’s testimony is, necessarily, more probative than his hearsay statement.²⁰⁵ Even if the declarant is dead or otherwise unavailable, if other eyewitnesses to the incident related

²⁰¹ Rule 803 (24) (B), M.R.E.; Rule 804(b)(5)(B), M.R.E.

²⁰² Saltzburg and Redden (Cum. Supp. 1981), *supra* note 55, at 262.

²⁰³ 610 F.2d 55 (1st Cir. 1979).

²⁰⁴ *Id.* at 61, quoting 4 Weinstein’s Evidence para. 803 (24).01 at 803-243 (1977).

²⁰⁵ See, e.g., *United States v. Mathis*, 559 F.2d 294, 298-99 (5th Cir.), *cert. denied*, 429 U.S. 1107 (1977). Notwithstanding the unavailability of the declarant for cross-examination, the Fifth Circuit did not dispute the trustworthiness of the statement. *Id.* at 298. See notes 263-267, *infra*, and accompanying text.

in the statement are available, their testimony may be "more probative" than the hearsay.²⁰⁶ Similarly, if hearsay records are offered under the residual exceptions but other admissible records can establish the same facts, the proffered hearsay should not be admitted.²⁰⁷

Arguably, if time before trial permits, the possibility that the deposition of an otherwise unavailable witness can be obtained renders the hearsay statement which is not subject to cross-examination "less probative."²⁰⁸ If, however, no other admissible evidence is available to establish the same point, the proffered hearsay may be considered "more probative" within the meaning of the residual exceptions.²⁰⁹ The residual exceptions may even be utilized to admit hearsay which is direct evidence of the point in question, even though expert testimony and circumstantial evidence tending to prove the same point is already available.²¹⁰ Moreover, hearsay evidence which merely offers greater detail or is more specific than evidence already available may be "more probative" on the point for which it is offered than any other evidence which the proponent can provide through reasonable efforts."²¹¹ If there is conflicting evidence on a certain material point, hearsay may also be admissible under the residual exceptions if it is the only evidence that can resolve that conflict.²¹²

²⁰⁶ *United States v. Fredericks*, 599 F.2d 262, 265 (8th Cir. 1979); *Workman v. Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562, 563-64 (N.D. Ohio 1975).

²⁰⁷ *United States v. Kim*, 595 F.2d 755, 766 (D.C. Cir. 1979).

²⁰⁸ See *Saltzburg and Redden* (Cum. Supp. 1981), *supra* note 55, at 262.

²⁰⁹ *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979); *United States v. Medico*, 557 F.2d 309, 316 (2d Cir.), *cert. denied*, 434 U.S. 486 (1977); *United States v. Leslie*, 542 F.2d 285, 291 (5th Cir. 1976); *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979).

²¹⁰ *Huff v. White Motor Corp.*, 609 F.2d 286, 295 (7th Cir. 1979).

²¹¹ *United States v. Bailey*, 439 F. Supp. 1303, 1306 (W.D. Pa.), *rev'd*, 581 F.2d 341 (3rd Cir. 1978). The district court was upheld, however, on this particular point. 581 F.2d at 347-48 note 11. See also *United States v. Iaconetti*, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976).

²¹² *United States v. Iaconetti*, 406 F. Supp. 554, 559 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976).

In "making a record" to establish the admissibility of hearsay under the residual exceptions, some courts have held that the proponent must make a "claim or showing" that the evidence is more probative than other reasonably available evidence.²¹³ If the record shows that the proponent has failed to find other non-hearsay evidence which is equally probative when it appears such evidence may exist, the proffered hearsay may be excluded.²¹⁴ It may therefore be advisable for the proponent to describe in detail the efforts made to find "more probative" evidence and the inability to do so. The proponent should also outline the specific areas in which the proffered hearsay is more probative than other existing evidence.

One court, however, has upheld the admission of residual hearsay, noting "[t]here is no record indication that the government could have obtained [the hearsay] evidence from another source,"²¹⁵ thereby suggesting a burden on the opponent of the hearsay to establish the existence of "more probative" evidence.²¹⁶ In any event, if the defendant in a criminal case offers the hearsay under the residual exceptions, his own testimony and his personal records should not be considered in determining whether there is "more probative" evidence available. To do otherwise might well infringe on his fifth amendment right against self-incrimination.²¹⁷

²¹³ *United States v. Kim*, 595 F.2d 755, 766 (D.C. Cir. 1979); *United States v. Reese*, 561 F.2d 894, 904 note 18 (D.C. Cir. 1979). *See also* *United States v. Medico*, 557 F.2d 309, 316 (2nd Cir.), *cert. denied*, 434 U.S. 986 (1977).

²¹⁴ *Matter of Sterling*, 444 F. Supp. 1043, 1046-47 (S.D.N.Y. 1977).

²¹⁵ *United States v. Lyon*, 567 F.2d 777, 784 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978).

²¹⁶ *See also* *United States v. Carlson*, 547 F.2d 1346, 1355 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). While the burden of proof may be on the proponent, once the representation that "more probative" evidence is unavailable has been made, the opponent may well have the burden of "going forward" with evidence to the contrary.

²¹⁷ *United States v. Kim*, 595 F.2d 755, 766 note 53 (D.C. Cir. 1979); *United States v. Thevis*, 84 F.R.D. 57, 67 (N.D. Ga. 1979). *But see* *United States v. Weisman*, 624 F.2d 1118, 1128-29 (2nd Cir. 1980).

IV.D. SERVING THE INTERESTS OF JUSTICE

Subsection (C) of both residual hearsay exceptions requires that the military judge find that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."²¹⁸ The Seventh Circuit has held that the "general purposes of the federal rules" are embodied in Rule 102, and that the interests of justice are served "by increasing the likelihood that the jury will ascertain the truth."²¹⁹ One district court has held that the "general purposes" of the rules are served by the admission of "relevant, reliable, needed evidence which is necessary for the ascertainment of the truth and a just determination."²²⁰ The Ninth Circuit has also held that subsection (C) "is simply a further emphasis upon the showing of necessity and reliability and a caution that the hearsay rule should not be lightly disregarded and the admission should be reconciled with the philosophy expressed in rule 102."²²¹ The Official Analysis of the M.R.E. goes so far as to state that Military Rule 803(24) "implements the general policy behind the Rules of permitting admission of probative and reliable evidence."²²² Similarly, the Eighth Circuit has held that to deprive a jury of trustworthy evidence would be contrary to the interests of justice.²²³

Indeed, the interests of justice may be best served by providing the jury with as much information as possible, particularly where other evidence in the case is conflicting.²²⁴ In determining that ad-

²¹⁸ Rule 803 (24) (C), M.R.E.; Rule 804 (b) (5) (C), M.R.E.

²¹⁹ *Huff v. White Motor Corp.*, 609 F.2d 286, 295 (7th Cir. 1979). Rule 102, F.R.E., is identical to the corresponding military rule. *See* text of Rule 102, F.R.E., at note 16, *supra*.

²²⁰ *United States v. Thevis*, 84 F.R.D. 57, 66 (N.D. Ga. 1979). *See also* *United States v. Medico*, 557 F.2d 309, 316 (2d Cir.), *cert. denied*, 434 U.S. 980 (1977).

²²¹ *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979).

²²² *Analysis*, 1980, MCM, *supra* note 9, at MCMCCX.

²²³ *United States v. Carlson*, 547 F.2d 1246, 1355 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

²²⁴ *United States v. Williams*, 573 F.2d 284, 288-89 (5th Cir. 1978); *United States v. Leslie*, 542 F.2d 285, 291 (5th Cir. 1976); *United States v. Iaconetti*, 406 F. Supp. 554, 559 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976).

mission of residual hearsay will serve the interests of justice, the court may properly consider that reliance on other non-hearsay evidence would be expensive and time-consuming.²²⁵ Citing Federal Rule 102, one district court has even stated that “the residual hearsay exception in Rule 804(b)(5) would appear to be the embodiment of the purposes and policies underlying the federal evidentiary rules.”²²⁶

Admission of hearsay under the residual exceptions, however, may not serve the interests of justice if more probative evidence is available,²²⁷ particularly if the actual declarant is present to testify.²²⁸ In contrast, if the declarant has been murdered by the defendant, such circumstances are “exceptional” and admission of the declarant’s hearsay statements may be in the interest of justice.²²⁹ The admission of speculative evidence is also inconsistent with the interests of justice.²³⁰

The courts have, not surprisingly, construed the “interests of justice” more narrowly in criminal prosecutions than in civil cases.²³¹

²²⁵ *United States v. American Cyanamid Co.*, 427 F. Supp. 859, 865 (S.D.N.Y. 1977). *American Cyanamid* has been criticized, however. See *United States v. Kim*, 595 F.2d 755, 756 note 54 (D.C. Cir. 1979); Saltzburg and Redden (Cum. Supp. 1981), *supra* note 55, at 17.

²²⁶ *United States v. Thevis*, 84 F.R.D. 57, 70 (N.D. Ga. 1979).

²²⁷ *Matter of Sterling*, 444 F. Supp. 1043, 1047 (S.D.N.Y. 1977).

²²⁸ *United States v. Mathis*, 559 F.2d 294 (5th Cir.), *cert. denied*, 429 U.S. 1107 (1977).

²²⁹ *United States v. Thevis*, 84 F.R.D. 57, 65 note 8 (N.D. Ga. 1979).

²³⁰ *United States v. Mandel*, 591 F.2d 1347, 1369, *vacated*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

²³¹ *Furtado v. Bishop*, 604 F.2d 80, 93 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir.), *cert. denied*, 429 U.S. 1107 (1977). One District court has even suggested that residual hearsay is admissible only in non-jury cases. *Ark-Mo Farms v. United States*, 530 F.2d 1384, 1386 (Ct. Claims 1976).

²³² *United States v. Bailey*, 581 F.2d 341, 350 (3rd Cir. 1978); *United States v. Thevis*, 84 F.R.D. 57, 61 note 1, 68 (N.D. Ga. 1979).

A few courts have also held that subsection (C) of the residual exceptions incorporates the requirements of the confrontation clause of the sixth amendment.²³² In making its determination that residual hearsay does or does not satisfy the interests of justice, "a court should exercise its discretion in order to avoid potential conflicts between confrontation rights and this hearsay exception."²³³ Two legal commentators have even suggested that subsection (C) of the residual exceptions requires that depositions be taken whenever possible, in lieu of admitting a hearsay statement which is not subject to cross-examination.²³⁴

There may also be another opportunity inherent in subsection (C) of the residual exceptions available only to the accused. In *Chambers v. Mississippi*,²³⁵ the defendant called one McDonald as a defense witness to authenticate his own written confession to the crime for which the accused was charged. On the witness stand, McDonald repudiated his confession during cross-examination by the state. The defendant sought to declare McDonald a hostile witness and cross-examine concerning his written confession. The state court refused to allow this cross-examination because it was precluded by state evidentiary rules. In effect, the defendant was barred from presenting valuable and necessary hearsay which could well have resulted in his acquittal.

The Supreme Court reversed Chambers' subsequent conviction, holding that exclusion of admittedly hearsay evidence in that situation constituted a denial of due process and confrontation, state evidentiary rules to the contrary notwithstanding. Significantly, the Court found that McDonald's confession "bore persuasive assurances of trustworthiness."²³⁶ Scholarly criticism has since recog-

²³² *United States v. Love*, 592 F.2d 1022, 1027 (8th Cir. 1979); *United States v. Bailey*, 581 F.2d 341, 350 (3rd Cir. 1978); *United States v. Turner*, 475 F. Supp. 194, 203 (E.D. Mich. 1978). *See also* *United States v. Oates*, 560 F.2d 45, 79 (2d Cir. 1977).

²³⁴ *Saltzburg and Redden* (Cum. Supp. 1981), *supra* note 55, at 262.

²³⁵ 410 U.S. 284 (1973).

²³⁶ *Id.* at 302. *See also* *Washington v. Texas*, 388 U.S. 14 (1967).

nized what amounts to a defense "right to present exculpatory evidence."²³⁷

Similarly, the Court of Military Appeals has applied *Chambers* to courts-martial. In *United States v. Johnson*,²³⁸ the accused offered a hearsay statement by one Tanner confessing to the crime for which the accused was on trial. The court found *Chambers* controlling and held the exclusion of the evidence to be a denial of due process.²³⁹ The court specifically found that Tanner's confession also "bore persuasive assurance of trustworthiness" and noted that "[t]rustworthiness of such a declaration, then, rather than a flat evidentiary rule, is the measure" (emphasis in original).²⁴⁰

While *Chambers* and *Johnson* were decided before the F.R.E. and M.R.E., respectively, were controlling, both decisions may influence the admissibility of residual hearsay offered by the defense. The defense can argue with some persuasiveness that *Chambers* and *Johnson* have found a measure of statutory expression in subsection (C) of the residual exceptions. Defense counsel should be prepared to argue that even if admission of hearsay offered by the defense would not otherwise meet the requirements of Military Rule 803(24)(C) or Rule 804(b)(5)(C), *Chambers* and *Johnson* may nevertheless mandate its admission "in the interests of justice."²⁴¹

²³⁷See, e.g., 2 Wright, Federal Practice and Procedure § 412 (1969) (footnotes omitted); Imwinkelreid, *Chambers v. Mississippi*, — U.S. — (1973), *The Constitutional Right to Present Defense Evidence*, 62 Mil. L. Rev. 225 (1973); Leslie N. Silverman, Note, *The Preclusion Sanction — A Violation of the Constitutional Right to Present a Defense*, 81 Yale L.J. 1342 (1972).

²³⁸3 M.J. 43 (C.M.A. 1977).

²³⁹*Id.* at 146. Judge Perry authored the opinion in *Johnson*, and Chief Judge Fletcher concurred in its reasoning. Judge Cook dissented, but cited no objection to the court's application of *Chambers*. The court also announced that such hearsay would prospectively be admissible as a statement against penal interest.

²⁴⁰*Id.* at 147.

²⁴¹Even *Chambers* and *Johnson*, however, still require "assurances of trustworthiness." Such assurances may be equated to the "circumstantial guarantees of trustworthiness" required by the residual exceptions. *United States v. Hinkson*, 632 F.2d 382, 386 (4th Cir. 1980) (proffered hearsay found untrustworthy, although both parties did not contest the "interests of justice" requirement). If the hearsay is truly exculpatory, it certainly is evidence of a "material fact" and may be "more probative" than other evidence.

Thus, defense counsel may be able to elevate to an issue of constitutional dimensions the discretionary admission of residual hearsay which is critical to the defense case.

V. UNAVAILABILITY VERSUS CONFRONTATION

The admissibility of hearsay under the residual exceptions to Military Rules 803(24) and 804(b)(5) at a court-martial is not predicated entirely on meeting the requirements of the exceptions. As in criminal cases governed by the F.R.E., the military judge in courts-martial must also determine if the declarant is or is not available, whether the residual hearsay violates the accused's right to confrontation, and whether the accused has waived his confrontation rights. These constitutional requirements may, in a given case, overlap with the statutory requirements of the residual exceptions. In any event, the military judge may wish to make findings with respect to each constitutional issue, as well as related statutory issue ~ . ~ * ~

V.A. THE REQUIREMENT OF UNAVAILABILITY

Military Rule 803(24) does not require the declarant to be unavailable. In contrast, Military Rule 804(b)(5) may be utilized only

²⁴²Such findings should not be confused with the "special findings" provided for by Article 51(d), U.C.M.J., 10 U.S.C. 851 (1976). Article 51(d) authorizes the military judge to make special findings of fact upon request in a trial without members. Essentially, such findings are limited to the "ultimate facts on which the law of the case must determine the rights of the parties . . . and not the evidence on which those ultimate facts are supposed to rest." *Norris v. Jackson*, 76 U.S. (9 Wall) 125, 126 (1870). Similarly, Military Rule 304(d)(4), concerning the use of confessions and admissions by the accused, requires the military judge to "state essential findings of fact on the record." See also Rules 311(d)(4) and 321(g), M.R.E.

Article 51(d), U.C.M.J., however, does not mandate special findings in a trial before members, nor does it require special findings in deciding preliminary questions of admissibility which do not themselves constitute the "ultimate facts." Moreover, Rule 304(d)(4) is not likely to govern the admission of residual hearsay since admissions of the accused are independently admissible under Military Rule 801(d)(2)(A). Nevertheless, nothing prohibits the military judge from making specific findings of fact on the record, pursuant to Military Rule 104(a), which will serve to clarify the appellate record. See generally Schinasi, *Special Findings: Their Use at Trial and On Appeal*, 87 Mil. L. Rev. 73, 118-120 (1980).

when the declarant is unavailable. Military Rule 804(a) defines “unavailability”:

“Unavailability as a witness” includes situations in which the declarant—

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the military judge to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant’s statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means; or

(6) is unavailable within the meaning of Article 49(d)(2).

A declarant is not unavailable as a witness if the declarant’s exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant’s statement for the purpose of preventing the witness from attending or testifying.²⁴³

²⁴³ Rule 804(a), M.R.E.

The federal courts have, not surprisingly, found declarants to be unavailable under Federal Rule 804(a),²⁴⁴ when the declarant is dead,²⁴⁵ has refused to testify at trial,²⁴⁶ cannot be found through diligent efforts,²⁴⁷ is a fugitive,²⁴⁸ is too ill to appear,²⁴⁹ or cannot remember the matter related in the statement.²⁵⁰ While the burden of establishing unavailability is on the proponent,²⁵¹ the trial court may accept mere representations of the proponent that the witness is unavailable in making its findings as to unavailability.²⁵² The burden, moreover, is on the opponent of the evidence to show error in the acceptance of particular representations of the proponent.²⁵³

Military Rule 804(a)(6), not found in the F.R.E., incorporates Article 49(d)(2), U.C.M.J., which also provides that a declarant is una-

²⁴⁴Rule 804(a), F.R.E., is substantially similar, except that subsection (a)(6) did not appear in the federal rule.

²⁴⁵*See, e.g.*, *United States v. Thevis*, 84 F.R.D. 57, 61 (N.D. Ga. 1979).

²⁴⁶*See, e.g.*, *United States v. Atkins*, 618 F.2d 366, 372 (5th Cir. 1980); *United States v. Garner*, 574 F.2d 1141, 1143 (4th Cir.), *cert. denied*, 99 S. Ct. 333 (1978); *United States v. Gonzalez*, 559 F.2d 1271, 1272 (5th Cir. 1977); *United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. Bailey*, 439 F. Supp. 1303, 1306 (W.D. Pa. 1977), *rev'd on other grounds*, 581 F.2d 341 (3rd Cir. 1978).

²⁴⁷*United States v. Medico*, 557 F.2d 309, 315 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977).

²⁴⁸*United States v. Ward*, 552 F.2d 1080, 1082 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977).

²⁴⁹*United States v. Anderson*, 618 F.2d 487, 491 (8th Cir. 1980).

²⁵⁰*United States v. Lyon*, 567 F.2d 777, 783-84 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978).

²⁵¹*Ohio v. Roberts*, 100 S. Ct. 2531, 2538 (1980); *United States v. Pelton*, 578 F.2d 701, 709 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978).

²⁵²*Bailey v. Southern Pacific Trans. Co.*, 613 F.2d 1385, 1390 (5th Cir.), *cert. denied*, 101 S. Ct. 109 (1980); *United States v. Burrow*, 16 C.M.A. 94, 36 C.M.R. 350. *But cf.* *Perricone v. Kansas City Southern Ry. Co.*, 630 F.2d 317, 321 (5th Cir. 1980).

²⁵³*Bailey v. Southern Pacific Trans. Co.*, 613 F.2d 1385, 1390 (5th Cir.), *cert. denied*, 101 S. Ct. 109 (1980).

vailable if "the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing."²⁵⁴ While largely repetitive of the other categories of Rule 804(a), Article 49(d)(2) includes the significant additional concern of "military necessity." The Official Analysis of Military Rule 804(a) explains that:

Rule 804(a)(6) is new and has been added in recognition of certain problems, such as combat operations, that are unique to the armed forces. Thus, Rule 804(a)(6) will make unavailable a witness who is unable to appear and testify in person for reason of military necessity within the meaning of Article 49(d)(2). The meaning of "military necessity" must be determined by reference to the cases construing Article 49. The expression is not intended to be a general escape clause, but must be limited to the limited circumstances that would permit use of a deposition.²⁵⁵

The Court of Military Appeals, however, has strictly construed the need for a witness' availability in court-martial proceedings despite "military necessity." Article 49(d)(1), U.C.M.J., provides that depositions of a witness may be admissible in a court-martial if the witness is more than one hundred miles from the place of trial.²⁵⁶ The Court of Military Appeals, however, has held that before a deposition may be utilized at trial, actual unavailability of a military witness must be established notwithstanding the fact that he may be more than one hundred miles from the place of trial.²⁵⁷ Although the M.R.E., including the residual exceptions, do not apply to

²⁵⁴ Art. 49(d)(2), U.C.M.J.; 10 U.S.C. 849(d)(2).

²⁵⁵ Analysis, 1980, MCM, *supra* note 9, at CCXII.

²⁵⁶ Art. 49(d)(1); 10 U.S.C. 849(d)(1).

²⁵⁷ *United States v. Mohr*, 21 C.M.A. 360, 45 C.M.R. 134 (1972); *United States v. Gaines*, 20 C.M.A. 557, 43 C.M.R. 397 (1971); *United States v. Davis*, 19 C.M.A. 217, 41 C.M.R. 217 (1970). Indeed, military law may require even higher standards from the prosecution than does federal law. *Compare United States v. Chambers*, 47 C.M.R. 549 (A.F.C.M.R. 1973) with *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

pretrial investigations conducted under Article 32, U.C.M.J.,²⁵⁸ the Court of Military Appeals has strictly interpreted the concept of "military necessity" in determining whether military witnesses are "unavailable" for Article 32 hearings. Even military witnesses thousands of miles away performing duty overseas have been held to be reasonably available in spite of expense and inconvenience to military authorities.²⁵⁹

Similarly, the federal courts have strictly construed the requirement of unavailability. Even if the proponent represents his good faith belief that the declarant is unavailable, subsequent proof by the opponent of the hearsay that the declarant was, in fact, easily available, may cause the intervening guilty verdict to be set aside.²⁶⁰ Moreover, unavailability at the time of trial, not merely at some earlier point in time, must be established.²⁶¹ The requirement in Rule 804(a)(5) that the hearsay proponent use "reasonable means" to procure the presence of the declarant also extends to using reasonable means to prevent a present witness from becoming absent.²⁶²

At first blush, the unavailability requirements of Rule 804(b)(5) may seem moot, because Rule 803(24) may be utilized whether the declarant is available or unavailable. The more relaxed requirements of Rule 803(24), however, may be illusory. In *United States v. Mathis*,²⁶³ government agents were permitted to read at trial a

²⁵⁸ Rule 1101(d), M.R.E. Article 32, U.C.M.J., requires a thorough and impartial investigation of charges before they can be referred to a general court-martial. The accused has the right to be present at such a hearing, and may cross-examine available witnesses. 10 U.S.C. 832 (1970).

²⁵⁹ *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). See also *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978); *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976). For an excellent discussion of "unavailability" in a military context, see S. Saltzburg, L. Schinasi, and D. Schlueter, *supra* note 24, at 374-76.

²⁶⁰ *Perricone v. Kansas City Southern Ry. Co.*, 630 F.2d 317, 321 (5th Cir. 1980).

²⁶¹ *Government of the Canal Zone v. P. (Pinto)*, 590 F.2d 1344, 1352 (5th Cir. 1979).

²⁶² *United States v. Mann*, 590 F.2d 361, 368 (1st Cir. 1978). See also *United States v. Gaines*, 20 C.M.A. 557, 559, 43 C.M.R. 397 (1977).

²⁶³ 559 F.2d 294 (5th Cir. 1977).

witness' statement which had been admitted under Federal Rule 803(24). The declarant was available, and was even present in the courthouse during trial. The Fifth Circuit reversed the conviction, holding that unavailability of the declarant had to be established even under Rule 803(24). The court stated:

While it has been contended that availability is an immaterial factor in the application of Rule 803(24), this argument is wide of the mark. Although the introductory clause of Rule 803 appears to dispense with availability, this condition re-enters the analysis of whether or not to admit statements into evidence under the last subsection of Rule 803 because of the requirement that the proponent use reasonable efforts to procure the most probative evidence on the points sought to be proved. Rule 803(24), thus, has a built-in requirement of necessity. Here there was no necessity to use the statements when the witness was within the courthouse. The trial court erred in overlooking this condition of admissibility under Rule 803(24).²⁶⁴

Similarly, the Tenth Circuit had indicated that "under no circumstances, including coercive acts by a defendant, should cross-examination of an *available* witness not be constitutionally mandated (emphasis in original)."²⁶⁵ Rule 803(24), of course, may still be utilized even if subsection (B) of the exception requires unavailability of the declarant,

The reasoning in *Mathis* seems to be valid, at least where the declarant is fully able and competent to testify as to the contents of the statement. To the extent the declarant is unable to do so, however, subsection (B) of Rule 803(24) may not require a showing that the declarant is unavailable.²⁶⁶ Nevertheless, the cautious applica-

²⁶⁴ *Id.*

²⁶⁵ *United States v. Balano*, 618 F.2d 624, 628 note 6 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980). (*See* note 74, *supra.*) This remark, however, is only dictum by one member of the court.

²⁶⁶ *See, e.g., United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978). While the statement in *Lyon* was admitted under Rule 804(b)(5), it is possible that a witness may not be "unavailable" within the meaning of Rule

tion of either residual exception at a criminal trial, particularly by the prosecution, should generally be predicated on the declarant's unavailability at trial. The Official Analysis of Military Rule 804(b)(5) states that, because Military Rule 803(24) applies without regard to the declarant's availability, Military Rule 804(b)(5) "is actually superfluous."²⁶⁷ To the extent the Court of Military Appeals may someday apply the *Mathis* requirement of unavailability to Military Rule 803(24), however, the converse may well be true, particularly with respect to prosecution evidence subject to the confrontation clause of the sixth amendment.

If the declarant must be unavailable in order to utilize residual hearsay, the residual exception of Rule 804 is the more appropriate of the two residual exceptions, since Rule 804 itself is generally predicated on the declarant's unavailability, whereas Rule 803 is by its very terms designed to be less restrictive. Concerning the differences in philosophy underlying the residual exceptions and the declarant's unavailability, one commentator has observed:

The dichotomy between Rules 803 and 804 should remind Courts that some Rules are more worrisome than others and that to the extent that the other exceptions [i.e., the residual exceptions] approximate those found in Rule 804, unavailability may be insisted upon. Since we have some concern about the open-endedness of the "other exceptions" provisions, we would have even greater concern if Courts were permitted to create new exceptions without

804(a), yet his hearsay statement might be more probative than his live testimony. Such circumstances are likely to be infrequent, however. One commentator has noted:

Despite the fact that the hearing of Rule 803 indicates that it covers hearsay exceptions where the availability of a declarant is immaterial, the fact that Rule 803(24) requires a Court to look at the availability of other evidence that can be produced in Court signifies that the availability of a declarant may be important, at least when the residual hearsay exception is invoked.

Saltzburg and Redden (Cum. Supp. 1981), *supra* note 55, at 237.

²⁶⁷ Analysis, 1980, MCM, *supra* note 9, at CCXV. Accord, *Comment, The Use of Prior Identification Evidence in Criminal Trials Under the Federal Rules of Evidence*, 66 J. Crim. L. & Crim. 240, 250-51 (1975).

attempting to analogize them to existing exceptions and in the process to the general requirements, including any required showing of unavailability, of those exceptions.²⁶⁸

Thus, in evaluating whether the declarant's unavailability is required, counsel may find it helpful to analogize the residual hearsay in question to those foregoing exceptions in Rules 803 and 804. Ultimately, if Rule 803(24) is utilized, the proponent should give serious thought to not offering the residual hearsay if the declarant is available to testify. On the other hand, if the declarant is unavailable, the prosecution, at least, must consider whether the lack of cross-examination will offend the confrontation clause of the sixth amendment.

V.B. THE FEDERAL, RIGHT TO CONFRONTATION

The "confrontation clause" of the sixth amendment provides that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."²⁶⁹ While this clause may seem to prohibit hearsay altogether, the Supreme Court has rejected such a conclusion as "unintended and too extreme."²⁷⁰ The confrontation clause does, however, "reflect a preference for face-to-face confrontation at trial."²⁷¹ The Supreme Court noted long ago in *Mnttox v. United States*²⁷² that the accused has a right to:

a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with

²⁶⁸ Saltzburg and Redden, *supra* note 11, at 628.

²⁶⁹ U.S. Const. amend. VI, *supra* note 8. An extensive analysis of the confrontation clause and all its ramifications is beyond the scope of this article. Only the judicial interpretation of the confrontation clause insofar as it relates to the residual exceptions is considered herein.

²⁷⁰ *Ohio v. Roberts*, 100 S. Ct. 2531, 2537 (1980).

²⁷¹ *Id.*

²⁷² 156 U.S. 237 (1895).

the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.²⁷³

The court has also recognized, however, that "competing interests . . . may warrant dispensing with confrontation at trial."²⁷⁴ In weighing those competing interests, the Supreme Court has utilized a two-part analysis.²⁷⁵ First, the prosecution must ordinarily "either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant,"²⁷⁶ although a demonstration of unavailability may be unnecessary if the utility of confrontation would be too remote.²⁷⁷ In *Barber v. Page*,²⁷⁸ the Supreme Court held that:

a witness is not "unavailable" for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.²⁷⁹ (Emphasis in original.)

The court also noted:

The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" de-

²⁷³*Id.* at 242-43.

²⁷⁴*Ohio v. Roberts*, 100 S.Ct. 2531, 2538 (1980). See also *Chambers v. Mississippi*, 410 U.S.284, 295 (1973); *Mattox v. United States*, 156 U.S.237, 243 (1895). Competing interests include the strong interest in effective law enforcement and the development of precise rules of evidence on the one hand, *Mattox*, *supra*, and the unique advantages of cross-examination on the other, *Chambers*, *supra*.

²⁷⁵*Ohio v. Roberts*, 100 S. Ct. 2531, 2538-39 (1980).

²⁷⁶*Id.* at 2538. See also *Mancusi v. Stubbs*, 408 U.S.204 (1972); *Barber v. Page*, 390 U.S.719 (1968).

²⁷⁷*Dutton v. Evans*, 400 U.S.74, 88 note 19 (1970).

²⁷⁸390 U.S.719 (1968).

²⁷⁹*Id.* at 24-25. See also *Mancusi v. Stubbs*, 408 U.S.204 (1972); *California v. Green*, 399 U.S.149, 161-162, 165, 167 (1970); *Berger v. California*, 393 U.S.314 (1969).

mands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation.²⁸⁰ (Emphasis in original.)

Such measures, however, need only be “reasonable.”²⁸¹ The court has succinctly stated, “[t]he ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.”²⁸² If the declarant is unavailable, of course, either of the residual exceptions may be utilized.

Second, once the declarant is shown to be unavailable, the court will examine the reliability of the hearsay statement. In *Mancusi v. Stubbs*,²⁸³ the court stated:

The focus of the court’s concern has been to insure that there “are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is not confrontation of the declarant” . . . and to “afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement”. . . . It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these “indicia of reliability.”²⁸⁴

The court has held that such indicia of reliability are found in certain hearsay statements, including dying declarations,²⁸⁵ statements against penal interest,²⁸⁶ testimony at preliminary hear-

²⁸⁰ *Ohio v. Roberts*, 100 S. Ct. 2531, 2543 (1980).

²⁸¹ *California v. Green*, 399 U.S. 149, 189 note 2 (1970) (concurring opinion).

²⁸² *Ohio v. Roberts*, 100 S. Ct. 2531, 2543 (1980).

²⁸³ 408 U.S. 204 (1972).

²⁸⁴ *Id.* at 213 (citations omitted). See also *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 161 (1970).

²⁸⁵ *United States v. Mattox*, 156 U.S. 237 (1895).

²⁸⁶ *Chambers v. Mississippi*, 410 U.S. 284 (1973).

ings,²⁸⁷ and former trial testimony.²⁸⁸ While the right of confrontation and the hearsay rule “stem from the same roots,”²⁸⁹ the concepts are not identical. In *California v. Green*,²⁹⁰ the court noted:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.²⁹¹

While it has been said that, as a practical matter, the residual hearsay exceptions and the confrontation clause have “merged,”²⁹² the

²⁸⁷ *California v. Green*, 399 U.S. 149 (1970). The testimony was subject to cross-examination. however.

²⁸⁸ *Mancusi v. Stubbs*, 408 U.S. 204 (1972). The testimony was, however subject to cross-examination.

²⁸⁹ *Dutton v. Evans*, 400 U.S. 71, 86 (1970).

²⁹⁰ 399 U.S. 149 (1970).

²⁹¹ *Id.* at 155–56. See also *United States v. Balano*, 618 F.2d 624, 627 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980) (note 74, *supra*); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978); *United States v. McConnico*, 7 M.J. 302, 305 (C.M.A. 1979).

²⁹² See *United States v. West*, 574 F.2d 1131, 1138 (4th Cir. 1978). See also *United States v. Thevis*, 84 F.R.D. 57, 69 (N.D. Ga. 1979), where the court stated:

Notwithstanding the Supreme Court's protestations in *California v. Green* . . . to the contrary, the net effect of the *Mancusi* holding is to

trial court should nevertheless make specific findings that hearsay offered under those exceptions not only possesses "equivalent circumstantial guarantees of trustworthiness" but also possesses "indicia of reliability."²⁹³ Even if the trial court is prepared to find a waiver of confrontation rights by the accused, it should nevertheless make findings as to the "indicia of reliability" of the hearsay in the event an appellate court overturns the finding of a waiver. Ordinarily, however, the same facts which demonstrate "trustworthiness" will also constitute "indicia of reliability."²⁹⁴

In *Dutton v. Evans*,²⁹⁵ the Supreme Court also suggested that, if the hearsay statement in question were "crucial" or "devastating" rather than "peripheral," its admission might have violated the confrontation clause.²⁹⁶ Similarly, the District of Columbia Circuit in *United States v. Yates*²⁹⁷ has held that hearsay otherwise admissible under the residual exception may still be inadmissible if it is "crucial" or "devastating."²⁹⁸ The Second Circuit, however, has stated:

incorporate and merge the hearsay rule with its attendant exceptions into the Confrontation Clause of the Sixth Amendment. The result of this merger is that otherwise admissible hearsay is subjected to still further constitutional scrutiny to determine if the proffered hearsay has sufficient "indicia of reliability" to avoid offending the Confrontation Clause of the Sixth Amendment.

Other courts, in the context of the residual hearsay exceptions, have disagreed. *United States v. Balano*, 618 F.2d 624, 627 (10th Cir. 1979) (dictum by one member of the court), *cert. denied*, 101 S. Ct. 118 (1980) (note 74, *supra*).

²⁹³See *United States v. Carlson*, 547 F.2d 1346, 1357 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. McConnico*, 7 M.J. 302, 309 (C.M.A. 1979).

²⁹⁴*United States v. West*, 574 F.2d 1131, 1137-38 (4th Cir. 1978).

²⁹⁵400 U.S. 71 (1970).

²⁹⁶*Id.* at 87.

²⁹⁷524 F.2d 1282 (D.C. Cir. 1975).

²⁹⁸*Id.* at 1386. The court also noted, "admittedly, the precise contours of these three requirements are not free from doubt, nor is it certain whether all three must be satisfied in every case." *Id.*

We do not agree that the *Dutton* standard that hearsay evidence not be "crucial" or "devastating" is applicable to the residual hearsay exception set forth in Rules 803(24) and 804(b)(5), Fed.R.Ev. *Dutton* was decided before the new federal rules were enacted. The *Yates* requirement would run counter to the express language of the two rules which require such evidence to be of a material fact. Moreover, subsequent to *Dutton* the rules as proposed by the Supreme Court itself had a broader residual hearsay exception than was finally enacted and made no reference to the matter being peripheral. A better analysis, we suggest, would require the exclusion of hearsay evidence which is "crucial" or "devastating" only where the unavailability of the declarant deprives the trier of fact of a satisfactory basis for evaluating the truth of the extrajudicial declaration.²⁹⁹

Similarly, the Fourth Circuit has rejected the "supposition" that *Dutton* prohibits admission of hearsay under the residual exceptions if it possesses "indicia of reliability" simply because the evidence is "crucial" or "devastating."³⁰⁰ Significantly, perhaps, the Supreme Court in *Ohio v. Roberts*³⁰¹ summarized the "law of confrontation" and made no mention of the "crucial," "devastating," or "peripheral" nature of the hearsay in question.³⁰²

In permitting certain hearsay statements possessing "indicia of reliability" to be used at trial, the Supreme Court has, in effect, limited the right to cross-examine. As the Fourth Circuit has observed:

The Supreme Court has never intimated, however, that cross-examination is the only means by which prior recorded testimony may be qualified for admission under the Confrontation Clause. Just as surrounding circumstances

²⁹⁹ *United States v. Medico*, 557 F.2d 309, 316 note 6 (2d Cir.), cert. denied, 434 U.S. 986 (1977).

³⁰⁰ *United States v. West*, 574 F.2d 1131, 1138 (4th Cir. 1978).

³⁰¹ 100 S. Ct. 2531 (1980).

³⁰² *Id.*

may give assurance of reliability to dying declarations and to declarations against penal interest, so surrounding circumstances may give assurance of reliability to prior recorded testimony which was not subject at the time to cross-examination. They also may provide the trier of fact with firm bases for judging the credibility of the witness and the truthfulness of his testimony.³⁰³

In applying the confrontation clause to residual hearsay, the courts "are to engage in a case-by-case analysis to determine whether the right of confrontation of the accused is violated."³⁰⁴ Accordingly, a number of courts have found, even in the absence of a waiver, that admission of the hearsay was constitutionally permissible. In *United States v. West*³⁰⁵ and *United States v. Garner*,³⁰⁶ the Fourth Circuit upheld the admission of the grand jury testimony of unavailable declarants, over confrontation clause objections, even though the defendant was denied the opportunity to cross-examine the declarant.

One district court, however, in *United States v. Thevis*,³⁰⁷ has held that grand jury testimony and similar statements were inadmissible, absent a waiver, even though the statutory requirements of the residual hearsay exceptions were met.³⁰⁸ The *Thevis* court relied heavily on *Mattox*, where the Supreme Court noted:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, be-

³⁰³ *United States v. West*, 574 F.2d 1131, 1137. See also *United States v. Balano*, 618 F.2d 624, 627 (10th Cir. 1979), cert. denied, 101 S. Ct. 118 (1980) (Note 74, *supra*). The right of cross-examination is not "absolute." *United States v. Carlson*, 547 F.2d 1346, 1356 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

³⁰⁴ *United States v. Carlson*, 547 F.2d 1346, 1357 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

³⁰⁵ 574 F.2d 1131 (4th Cir. 1978).

³⁰⁶ 574 F.2d 1141 (4th Cir.), cert. denied, 99 S. Ct. 333 (1978).

³⁰⁷ 84 F.R.D. 57 (N.D. Ga. 1979).

³⁰⁸ *Id.*

ing used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.³⁰⁹

Since the statements in *Thevis* were "taken by the prosecution for use in the pending criminal indictment against defendant Thevis," the court equated such hearsay, in spite of its "indicia of reliability," with the *ex parte* affidavits and depositions" prohibited by the Supreme Court in *Mattox*.³¹⁰ Other courts have similarly remarked in dictum that grand jury testimony or similar statements, which may be otherwise admissible under the residual hearsay exceptions, nevertheless run afoul of the confrontation clause because of the absence of cross-examination.³¹¹ In *United States v. Balano*,³¹² the court remarked:

We recognize that the Supreme Court has appeared to give overriding significance to "indicia of reliability." ...

³⁰⁹ 156 U.S. at 242-43.

³¹⁰ 84 F.R.D. at 70. See also *United States v. McConnico*, 7 M.J. 302, 309 (C.M.A. 1979).

³¹¹ See *United States v. Balano*, 618 F.2d 624, 627 n. 5 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980) (Note 74, *supra*); *United States v. Turner*, 475 F. Supp. 194, 203 (E.D. Mich. 1978). In a dissent from a denial of certiorari, Mr. Justice Stewart, joined by Mr. Justice Marshall, also expressed "grave doubts" about the admissibility of grand jury testimony, absent cross-examination. *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333, 335 (1978). See also *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971); *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979).

There is a paucity of cases dealing with the interplay of the confrontation clause and the residual exceptions. Many courts find the statutory requirements have not been met, and thus never reach the constitutional issue. In some cases, the defendant surprisingly has never raised the confrontation issue. Oftentimes, the residual hearsay was offered by the defendant, so the confrontation clause never became an issue. Civil cases, of course, are not affected by the confrontation clause.

³¹² 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980).

In *Mancusi*, however, the hearsay statements came from testimony at an earlier trial, and the determinative indicium of reliability was an "adequate opportunity to cross-examine" at that earlier trial.³¹³

At least two Justices of the Supreme Court may hold a similar view.³¹⁴

If, however, the hearsay is a document which does not possess the accusatory attributes of an "*ex parte* affidavit" or deposition, cross-examination of a witness testifying about the contents of the document may satisfy the confrontation clause.³¹⁵

Thus, the federal courts are divided on the necessity of cross-examination of the declarant when the hearsay is otherwise admissible under the residual exceptions.

V.C. THE MILITARY RIGHT TO CONFRONTATION

The Court of Military Appeals has repeatedly recognized that a military accused is entitled "to be confronted by witnesses against him" and "to cross-examine witnesses for the government."³¹⁶ A military accused is also entitled to be present with counsel during the taking of depositions.³¹⁷ Moreover, military due process requires that a witness be actually unavailable at trial before his deposition or former testimony may be admitted against the accused at

³¹³*Id.* at 627 note 4. This remark, however, was dictum.

³¹⁴See *United States v. Garner*, 99 S. Ct. 333 (1978) (denial of certiorari) (dissenting opinion). One of the two is Justice Stewart, recently retired.

³¹⁵*United States v. Ratliff*, 623 F.2d 1293, 1296 (8th Cir. 1980). See also *United States v. White*, 611 F.2d 531, 538 (5th Cir.), cert. denied, 100 S. Ct. 2978 (1980).

³¹⁶*United States v. McConnico*, 7 M.J. 302 (C.M.A. 1979); *United States v. Conley*, 4 M.J. 327 (C.M.A. 1978); *United States v. Cook*, 20 C.M.A. 504, 43 C.M.R. 344 (1971); *United States v. Clay*, 1 C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

³¹⁷*United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960).

his court-martial, the one hundred mile clause of Article 49(d)(1) notwithstanding.³¹⁸

While the Court of Military Appeals has held that former testimony at an Article 32 hearing may be admissible against an accused if he had the opportunity at such hearing to confront and cross-examine the declarant,³¹⁹ in determining whether cross-examination is required, the court has stated that the "significance of the witness' testimony must be weighed against the relative difficulty and expense of obtaining the witness' presence at the investigation."³²⁰ In *United States v. Chestnut*,³²¹ the Court of Military Appeals reversed the conviction of a servicemember because he was denied the opportunity to confront and cross-examine a key witness at the Article 32 hearing or by way of deposition, even though he did in fact interview the witness before trial and was able to cross-examine at trial.³²² This rule may apply even if the witness is present at the Article 32 hearing but refuses to testify on cross-examination because of his fifth amendment privilege.³²³ Indeed, the military accused's right to confrontation in such a circumstance is violated even if the witness is able to testify fully at trial and is subject to cross-examination.³²⁴

³¹⁸ See notes 256 and 257, *supra*. See also *United States v. Obligation*, 17 C.M.A. 162, 37 C.M.R. 300 (1967); *United States v. Chambers*, 47 C.M.R. 549 (A.F.C.M.R. 1973).

³¹⁹ *United States v. Burrow*, 16 C.M.A. 94, 36 C.M.R. 250 (1956).

³²⁰ *United States v. Ledbetter*, 2 M.J. 37, 44 (C.M.A. 1976).

³²¹ 2 M.J. 84 (C.M.A. 1976).

³²² *Id.* at 85.

³²³ *United States v. Jackson*, 3 M.J. 597, 599 (N.C.M.R.), *affd.*, 3 M.J. 206 (C.M.A. 1977). *Cf. Witham v. Mabry*, 596 F.2d 293 (8th Cir. 1979); *United States v. Lang*, 589 F.2d 92 (2d Cir. 1978); *United States v. Thomas*, 571 F.2d 285 (5th Cir. 1978). In these three cases, witnesses' invocation of their fifth amendment right against self-incrimination made them "unavailable" for purposes of Rule 804(a).

³²⁴ *United States v. Jackson*, 3 M.J. 597, 599 (N.C.M.R.), *affd.*, 3 M. 206 (C.M.A. 1977).

The Court of Military Appeals has also held that, if laboratory reports otherwise admissible under the traditional business record exception of the hearsay rule are admitted, the accused may nevertheless require the person preparing the report to appear at trial and be cross-examined.³²⁵ There is, however, a need for the defense to show "necessity" before the chemist may be required to appear.³²⁶

It can readily be seen that hearsay which satisfies the statutory requirements of the residual exceptions and meets the constitutional requirements of the confrontation clause may not fully satisfy the more stringent limitations of military law. This is particularly true of statements obtained during an Article 32 investigation.³²⁷ Moreover, the military appellate courts have applied the "unavailability" requirement of confrontation more stringently than their federal counterparts.³²⁸ In litigating the admissibility of hearsay under the residual exceptions, counsel and the military judge should therefore be careful not to overlook the more rigorous peculiarities of military law and to make an adequate factual record replete with preliminary findings of fact and law.

The Court of Military Appeals has not yet ruled on the admissibility of hearsay under the residual exceptions, or on the application of the confrontation clause to those exceptions. The court has, however, expressed an extremely cautious application of the rules formulated by the Supreme Court. In *United States v. McConnico*,³²⁹ the Court of Military Appeals considered the admissibility at trial of the confession of one Perdue, a principal to the crime for which the accused was alleged to be an accessory after the fact. Like the court in *Thevis*, it characterized the confrontation clause as "a constitutional provision designed to prohibit in criminal trials 'the practice of trying defendants on "evidence" which consisted solely of *ex*

³²⁵ *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979); *United States v. Evans*, 21 C.M.A. 579, 45 C.M.R. 353 (1972).

³²⁶ *United States v. Vietor*, 10 M.J. 69, 72 (C.M.A. 1980).

³²⁷ *United States v. Chuculate*, 5 M.J. 143, 145 note 7 (C.M.A. 1978).

³²⁸ Compare note 270, *supra*, and accompanying text, with Rule 804(a)(1), M.R.E. See also note 219, *supra*, and accompanying text.

³²⁹ 7 M.J. 302 (C.M.A. 1979).

parte affidavits or depositions” which deny the defendant the “opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.”³³⁰ After a lengthy and careful review of the history of the confrontation clause, then-Chief Judge Fletcher concluded that:

it would be imprudent for this Court to definitively rule that the introduction of Perdue’s confession under the circumstances of the appellant’s case did not in some way violate the appellant’s right to confrontation.³³¹

He then added in a footnote, “I accept this conclusion at the present time without deciding the issue, until more clear pronouncements in this area of constitutional law reach us from the Supreme Court.”³³²

Thus, at least one member of the Court of Military Appeals is inclined to presume a denial of confrontation in the absence of clear guidance to the contrary from the Supreme Court. Given the divided approach of the lower federal courts over the application of the confrontation clause to the residual hearsay exceptions, the stricter application of confrontation rights by the military courts, the absence of Supreme Court decisions interpreting the residual exceptions, and the negative reactions of two Supreme Court Justices, the attitude expressed by the Court of Military Appeals in *McConnico* may well result in severe limitations on the use of the residual exceptions by the prosecution in courts-martial, at least where the accused had no opportunity to cross-examine the declarant.

V.D. WAIVER OF CONFRONTATION RIGHTS

Even if the military judge finds that hearsay offered by the prosecution satisfies the statutory requirements of the residual hearsay exceptions, but nevertheless violates the confrontation clause, the

³³⁰ *United States v. McConnico*, 7 M.J. 302, 305 (C.M.A. 1979).

³³¹ *Id.* at 309.

³³² *Id.* at 309 note 23. Judge Cook did not share Chief Judge Fletcher’s view that the confrontation clause was violated. *Id.* at 310. Judge Perry, however, was more certain than Chief Judge Fletcher that the accused’s confrontation rights were violated. *Id.* at 310–11.

hearsay may still be properly admitted if the accused has waived his constitutional right to confrontation. The Tenth Circuit has even suggested that, if a defendant has waived his confrontation rights, he has also waived all evidentiary objections of a statutory nature that he might have had to the admission of residual hearsay.³³³

The Supreme Court has long recognized that a criminal defendant can waive certain aspects of his confrontation rights. In *Brookhart v. Janis*,³³⁴ the court held that defendant may agree not to cross-examine witnesses at his trial. The accused may also waive his confrontation rights by entering into stipulations,³³⁵ by pleading

³³³ *United States v. Balano*, 618 F.2d 624, 626 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980) (note 74, *supra*). The court remarked:

Because we find a waiver of confrontation rights, we need not consider whether the testimony met the standards for admission under Rule 804(b)(5). A valid waiver of the constitutional right is a *fortiori* a valid waiver of an objection under the rules of evidence.

No authority was cited for this proposition. Certainly, to whatever extent the admissibility of residual hearsay under Rule 803(24) may be predicated on the availability of the declarant, conduct constituting a waiver of confrontation rights might also constitute a waiver of any evidentiary requirement that the declarant be subject to cross-examination. *See, e.g.*, notes 183–194, *supra*, and accompanying text.

It is, however, an entirely different proposition to suggest that a waiver of confrontation should also be considered a waiver of the evidentiary requirements that residual hearsay have circumstantial guarantees of trustworthiness, that it be more probative than other evidence reasonably available, that it be offered as evidence of a material fact, and that pretrial notice be given. The satisfaction of these statutory requirements is not generally dependent on the availability of the declarant, the only factor adversely affected by the defendant's misconduct giving rise to the waiver.

While it may be appropriate to prevent a defendant from profiting by his own misconduct, *Balano*, at least arguably, goes further by actually penalizing him for procuring the declarant's absence. *Balano*, in effect, creates a new exception to the hearsay rule—statements by a declarant whose unavailability was procured by the defendant.

³³⁴ 384 U.S. 1 (1966).

³³⁵ *United States v. Martin*, 489 F.2d 674, 678 (9th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974). *See also* *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959); *Diaz v. United States*, 233 U.S. 442, 451 (1912).

guilty,³³⁶ and through his own misconduct.³³⁷ This is particularly true if he voluntarily absents himself from trial,³³⁸ or must be removed from the courtroom because of his disruptive behavior at trial.³³⁹ Similarly, the Sixth Circuit in *United States v. Mayes*,³⁴⁰ has held that, if a witness' invocation of the fifth amendment at trial results in the placing before the jury of his confession implicating the accused, the accused's confrontation rights are not denied if the witness' refusal to testify was procured by the defendant.³⁴¹ The court noted, "the defendant cannot now be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial."³⁴²

Before the accused may validly waive a constitutional right, however, there must be "an intentional relinquishment or abandonment of a known right or privilege."³⁴³ The right of confrontation is "personal" to the accused.³⁴⁴ Therefore, a waiver cannot be found unless the "defendant forfeited his right to confront his accusers personally."³⁴⁵ The defendant need not, however, have been "explicitly advised" of his confrontation rights before his misconduct in order for the court to find a waiver of those rights.³⁴⁶ The unavailability of

³³⁶ *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

³³⁷ *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934).

³³⁸ *Taylor v. United States*, 414 U.S. 17 (1973); *Diaz v. United States*, 223 U.S. 442, 455 (1912).

³³⁹ *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970).

³⁴⁰ 512 F.2d 637 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975). *Cf. Douglas v. Alabama*, 380 U.S. 415, 420 (1970).

³⁴¹ *United States v. Mayes*, 512 F.2d 637, 648-51 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975).

³⁴² *Id.* at 651

³⁴³ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

³⁴⁴ *Faretta v. California*, 422 U.S. 806, 819 (1975).

³⁴⁵ *United States v. Carlson*, 547 F.2d 1346, 1358 note 11 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

³⁴⁶ *Id.* at 1360.

the hearsay declarant, however, must be “directly attributed” to the defendant before a waiver will be found.³⁴⁷ While the court may never presume a defendant has waived his constitutional rights,³⁴⁸ it may, however, draw an inference that the right was voluntarily waived based on the facts of the case and the conduct of the defendant.³⁴⁹

Applying the foregoing principles, several lower federal courts have admitted residual hearsay offered by the prosecution because the defendant waived his confrontation rights. In *United States v. Carlson*, the Eighth Circuit found that the defendant caused the hearsay declarant, one Tindall, not to testify at trial through the defendant’s threats, although he “did not explicitly manifest his consent to a waiver of his confrontation rights.”³⁵⁰ Such action by the accused is “itself inimical to the administration of justice.”³⁵¹ Since the court noted that the accused could certainly not invoke the confrontation clause if he had murdered the hearsay declarant,

a defendant should not be afforded the protection of the confrontation clause if he achieves his objective of silencing a witness by less drastic, but equally effective, means. Carlson would have been able to confront Tindall at trial had he not taken steps to assure Tindall’s “unavailability” at trial.³⁵²

In *Carlson*, the court expressly found that the prosecution had met the statutory requirements of Rule 804(b)(5), but declined to rule as

³⁴⁷ *United States v. Gonzalez*, 559 F.2d 1271, 1274 (5th Cir. 1977).

³⁴⁸ *United States v. Partlow*, 428 F.2d 814 (2d Cir. 1970).

³⁴⁹ *United States v. Tortora*, 464 F.2d 120 (2d Cir. 1972); *United States v. Peebles*, 3 M.J. 177, 181 (C.M.A. 1977) (concurring opinion).

³⁵⁰ *United States v. Carlson*, 547 F.2d 1346, 1358 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). *Cf.* *United States v. Gonzalez*, 559 F.2d 1271, 1274 (5th Cir. 1977) where a waiver was not found because “here there were not direct threats made against [the declarant] by the defendant.” *Id.*

³⁵¹ *United States v. Carlson*, 547 F.2d 1346, 1358 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

³⁵² *Id.* at 1359.

to whether or not the confrontation clause would have been violated absent a waiver.³⁵³

The Tenth Circuit reached a similar result in *United States v. Balano*, where the court found that the defendant had intimidated the hearsay declarant, thereby causing his refusal to testify.³⁵⁴ The hearsay evidence, grand jury testimony, was still inadmissible against co-defendants not participating in the intimidation since they had not waived their right to cross-examine the declarant.³⁵⁵ Although one member of the court panel remarked in dictum that the defendant's confrontation rights would have been violated absent a waiver, the other members of the panel declined to join that opinion. The entire panel, however, found it unnecessary to consider whether the statutory requirements of the exception had been satisfied.³⁵⁶

Similarly, in *United States v. Thevis*, the district court found that the defendant had participated in a conspiracy to murder the hearsay declarant, and that he was, in fact, murdered. The declarant's grand jury testimony, which met the statutory requirements of Federal Rule 804(b)(5), but did not satisfy the confrontation clause, was therefore admitted.³⁵⁷

While the Court of Military Appeals has never considered a waiver of confrontation in the context of the residual hearsay exceptions, it has done so in the context of the accused absents himself from the trial. In doing so, the court has reaffirmed the requirement of the federal courts that the waiver must be voluntary.³⁵⁸ If

³⁵³*Id.* at 1356, 1357.

³⁵⁴*United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 118 (1980) (note 74, *supra*).

³⁵⁵*Id.* at 630.

³⁵⁶*Id.* at 626, 633. See also note 336, *supra*.

³⁵⁷*United States v. Thevis*, 84 F.R.D. 57, 66, 68, 71 (N.D. Ga. 1979).

³⁵⁸*United States v. Cook*, 20 C.M.A. 504, 43 C.M.R. 344 (1971); *United States v. Houghtaling*, 2 C.M.A. 230, 8 C.M.R. 30 (1953).

there is a question as to voluntariness, the military judge must, of course "make a proper exploration of the issue" of voluntariness.³⁵⁹ The accused may also waive his statutory right to confront witnesses at an Article 32 hearing if he does not object in a timely manner. Failure to do so may mean that "the merger with the cross-examination rights at trial and the absence of any perceptible adverse effect on appellant's rights removes any basis for reversal."³⁶⁰

VI. CONCLUSION

Several conclusions can be distilled from the response of the federal courts to the residual hearsay exceptions, and from the interpretations by both federal and military courts of the confrontation clause and enabling legislation.

VI.A. NOTICE

The proponent should give notice of his intent to utilize the residual exceptions as far in advance of trial as possible. He should give his notice by as formal a means as practicable, preferably in a pleading filed with the military judge. The notice should state both the name and address or unit of the declarant. If, however, circumstances prevent such "ideal notice," the proponent should nevertheless persevere in his efforts. His reasons for failure to give earlier, or better, notice should be made a matter of record.

If the opponent desires a reasonable recess or continuance to meet the proffered hearsay, the proponent generally should not oppose the request. The military judge should similarly inquire if the opponent has had sufficient notice, or needs additional time to prepare. The possibility of obtaining a deposition of the declarant on the notice available should be considered in determining whether or not sufficient notice has been given.

³⁵⁹ *United States v. Cook*, 20 C.M.A. 504, 43 C.M.R. 344, 347 (1971).

³⁶⁰ *United States v. Cruz*, 5 M.J. 286, 289 (C.M.A. 1978).

VI.B. ARTICLE 39(a) SESSION

The admissibility of residual hearsay should, ideally, be litigated at an Article 39(a) session well before trial. The proponent should marshal and present evidence, whether admissible itself or not, demonstrating the trustworthiness of the statement and, in the case of prosecution evidence, its indicia of reliability. If the prosecution can possibly establish a waiver by the accused of his confrontation rights, such evidence should be offered at this time. The opponent of the proffered hearsay should likewise offer evidence attacking the trustworthiness or reliability of the evidence. The basis of the objections to the hearsay should be stated with particularity. Similarly, evidence or arguments, or both, concerning the other statutory requirements of the residual exceptions should be presented to the military judge at that time.

At the conclusion of the Article 39(a) session, the military judge should make specific findings that (1) proper notice was or was not given; (2) the proffered hearsay does or does not have circumstantial guarantees of trustworthiness equivalent to stated hearsay exceptions, citing the facts found by the court which justify such a conclusion; (3) the proffered hearsay is or is not evidence of a material fact; (4) the hearsay is or is not more probative than other evidence the proponent could procure through reasonable efforts; (5) admission of the hearsay would or would not serve the general purposes of the rules and the interests of justice, and the reasons for such conclusions; (6) the declarant is or is not unavailable within the meaning of Rule 804(a); (7) the evidence, if offered by the prosecution, does or does not possess "indicia of reliability"; and (8) the right of confrontation, if the evidence is offered by the prosecution, has or has not been waived. If such a waiver is established by "clear and convincing" evidence, the military judge should so state on the record. The military judge should bear in mind that hearsay evidence which meets the requirements of the residual exceptions and the confrontation clause of the sixth amendment may still not satisfy the stringent confrontation requirements of Article 32, U.C.M.J.

Finally, at the close of the evidence, the military judge should review his ruling admitting or excluding the proffered hearsay. He or she should make specific findings, when appropriate, as to addition-

al factors which may have arisen during trial which bear on the admissibility of the residual hearsay.

VI.C. PROSECUTION "POINTERS"

The residual hearsay exceptions are potentially dangerous to the prosecution since: (1) it must contend with the confrontation clause of the sixth amendment and the confrontation rights of Article 32, U.C.M.J., and (2) it cannot generally appeal an error by the military judge in admitting or excluding evidence. The prosecution should therefore make the declarant available for cross-examination whenever possible. The trial counsel should even consider a deposition, if possible, in lieu of utilizing the residual exceptions. If the declarant is truly unavailable, Rule 804(b)(5) is better utilized than Rule 803(24). The Government should be very cautious in attempting to justify unavailability with "military necessity." It should also make continued efforts during trial to make the declarant available, if feasible. The prosecution should always try to establish a waiver of confrontation rights, if supported by the evidence.

The residual exceptions should only be used if truly necessary to gain a conviction. Such discretion is not only consistent with the legislative history of the exceptions, it also minimizes the possibility of reversal in an otherwise sound case. If residual hearsay is deemed necessary, and the military judge admits it conditionally, the trial counsel, in a trial with court members, should seriously consider not offering the evidence until the close of his case, or even until rebuttal. If the military judge should reverse his ruling based on newly discovered evidence or unforeseen circumstances, the chances of a mistrial being declared are thereby reduced.

VID. DEFENSE "POINTERS"

The residual exceptions have been under-utilized by defense counsel. Since the exclusion of defense evidence may inject error into the trial record, and the Government may not generally appeal the improper admission of defense evidence, the accused has little to lose in offering residual hearsay. This is particularly true because the confrontation clause serves only to protect the accused and not the Government. The theories set forth in *Chambers v. Mississippi*

*pi*³⁶¹ should be utilized in arguing that admission of the hearsay would be in the best interests of justice. Since the accused has a constitutional right not to testify, his testimony or personal records need not be considered in determining if "more probative" evidence exists.

When prosecution hearsay is offered, the defense should press the confrontation clause to its full advantage. Defense counsel should, when practicable, insist on depositions, and attempt, whenever feasible, to establish that the declarant is truly available. If defense counsel feels that there is a substantial possibility that the military judge might reverse his conditional admission of prosecution hearsay after presentation of other evidence during trial, the accused should consider demanding trial before a court with members. Should the military judge reverse himself, the opportunities for mistrial are greater. Trial defense counsel should vigorously continue attempts to exclude the hearsay even though the military judge has initially admitted the evidence. Particularly, the defense should continue to undercut the apparent trustworthiness of the hearsay, attempt to find "more probative" evidence which would be subject to cross-examination, and attempt to locate the declarant, if possible.

In any "conclusion" or summary the risks of over-simplification are great. Efforts to simplify complex problems can have the effect of complicating them even further. Nevertheless, it seems safe to conclude that the admissibility of hearsay under the residual exceptions to the hearsay rule of the M.R.E. must necessarily be decided on a case-by-case basis, and then only after thoughtful consideration by court and counsel.

³⁶¹ 410 U.S. 284 (1973).

MILITARY JUSTICE WITHIN THE BRITISH ARMY*

by Mr. Peter J. Rowe**

In this article, Mr. Rowe, a British legal scholar, describes the system of military justice used in the British armed forces. Courts-martial trial and appellate proceedings are discussed, along with summary disposition by the commanding officer, the equivalent of American nonjudicial punishment. The tension between the requirements of military discipline and civilian justice, so familiar to American military lawyers, is considered.

Mr. Rowe reviews the European Convention on Human Rights and the case law developed by the European Commission and Court established by the Convention. He discusses the possibility that British military justice procedures may not satisfy the Convention's requirements in certain respects. Mr. Rowe concludes with a proposal for amendment of existing law to redistribute punishment authority between commanders and courts-martial, and to accomplish other changes.

I. INTRODUCTION

In the legal system of the United Kingdom, British nonmilitary courts may under some circumstances intervene in the military jus-

* The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other agency of the United States Government or any foreign government.

** Lecturer, Faculty of Law, University of Liverpool, United Kingdom. Barrister, Lincoln's Inn, 1979. LL.B., University of Belfast, 1970; LL.M., University of London, 1977. Author of a book, *Health and Safety at Work* (1980), and various articles and notes. Co-author, with S.G.M. Jetha, of *The Armed Forces Act 1976*, 40 Mod.L.Rev. 444 (1977). Mr. Rowe is currently working on *Annotation of Armed Forces Act 1981* for the publication *Current Law Statutes Annotated*.

tice system of the British army.¹ This article reviews those circumstances, with particular attention to whether a commanding officer's powers to discipline the men under his command may be challenged in a national or international court. Such an intervention might be sought directly by an appeal from a court-martial to the Court-Martial Appeal Court, through an application for judicial review under Order 53, Rules of the Supreme Court,² by habeas corpus proceedings, by an application to the European Commission established under the European Convention on Human Rights, or indirectly through an action for damages against individuals.

In any army the need for discipline is fundamental. Without its enforcement, "such forces are but a mob—dangerous to all but the enemies of their country."³ How far, it must be asked, should the interests of the state in a disciplined army impinge on the rights of those who serve in it?⁴ More particularly the issue revolves around the question whether if a soldier wishes to bring an action in a court concerning the conduct of either a court-martial or his commanding

'Discussion will be confined to the army since naval law is in many respects different, but occasional reference will be made to it. *See generally*, Naval Discipline Act, 1957, and subsequent Armed Forces Acts. Air force law is largely identical to that governing the army.

² Before 1977, applications were made for one of the prerogative writs of certiorari, prohibition, or mandamus. For convenience, applications for habeas corpus will be included within the term "applications for judicial review."

³ *Darling* Committee, Report of the Committee Constituted by the Army Council to Enquire into the Law and Rules of Procedure Regulating Military Courts-Martial, Cmnd. No. 428, at para. 108 (1919). *See also* Sutton v. Johnstone, 1 Term. Rep. 493, 550 (1786) (Exchequer Chamber), *and compare* Cockburn, C.J., *dissenting in* Dawkins v. Lord Paulet, L.R. 5 Q.B. 94 (1869).

⁴ *See* R. v. Secretary of State for Home Dept. *ex parte* Hosenball, 3 All E.R. 452 (1977), where Lord Denning, M.R., states, "our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place." *Id.* at 457. The United States Supreme Court has expressed similar sentiments:

The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Parker v. Levy, 417 U.S. 733, 758 (1974).

officer, is this, without more, subversive of discipline and, in the interests of the group, to be prohibited or severely limited? These are essentially questions of policy.

When a man joins the army he assumes all those particular duties and responsibilities imposed by military law⁵ but he does not thereby relinquish all those rights and duties possessed by other citizens. The Lewis Committee⁶ in 1946 thought that:

in the matter of legal safeguards, citizens should be no worse off when they are in the Forces than in civil life unless considerations of discipline or other circumstances make such a disadvantage inevitable.

It is therefore not accurate to say of a man that, by joining the army, he has entered into a compact⁷ under which his rights become the concern only of military men and not of the courts. Such an approach requires a distinction to be drawn between a conscript (seen at various times in military history) and a volunteer. Moreover, it tends to introduce a form of *volenti* under which a soldier is treated as an "outcast from the law."⁸

⁵ Army Act, 1955, as amended by the Armed Forces Acts of 1966, 1971, 1976, and 1981, hereafter referred to as the Army Act. This additional duty to obey military law is a factor taken into consideration by the Review Body on Armed Forces Pay, Third Report 1974, Cmnd. No. 5631, at para. 8.

⁶ Lewis Committee, Report of the Army and Air Force Court-Martial Committee, Cmnd. No. 7608, at para. 138 (1946). See also the opinion of Sir James Mansfield, C.J., in *Burdett v. Abbott*, 4 Taunt. 401 (1812), as follows:

It is therefore highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman.

Id. at 403.

⁷ *R. v. Army Council ex parte Ravenscroft*, 2 K.B. 504, 514 (1917) (Avory, J.); *Marks v. Frogley*, 1 Q.B. 888 (1898) (A.L. Smith, L.J.); *Dawkins v. Lord Rokeby*, 4 F. & F. 806, 832 (1873) (Wiles, J.); *Home v. Bentinck*, 8 Price 225, 251 (1820) (Dallas, C.J.). Compare *Heddon v. Evans*, 35 T.L.R. 642, 643 (1919) (McCardie, J.); *Dawkins v. Lord Paulet*, L.R. 5 Q.B. 94, 109 (1869) (Cockburn, C.J., dissenting); Lewis Committee, note 6, *supra*, at para. 7.

⁸ *Warden v. Bailey*, 4 Taunt. 67, 84 (1811) (argument of Serjeant Lens).

Indeed, if any compact is to be implied here it must be that the soldier submits himself to military law and not to military illegality. In any democratic society there must be means available by which a convicted soldier can test, outside the military legal system, the legality of a finding against him. Moreover, there is no provision in the Army Act prohibiting recourse to the civil courts.⁹

First we shall look at the means available to a soldier convicted by a court-martial to seek judicial intervention, and next, the means available to a soldier dealt with by his commanding officer. Finally, we shall consider the impact of the European Convention on Human Rights in this field of military justice.

11. COURTS-MARTIAL¹⁰

A district court-martial is a body of three officers which may try private soldiers and noncommissioned officers and impose imprisonment or detention to a maximum of 2 years, reduction in rank, or a fine. It is presided over by an officer of the rank of major or above, and it may be assisted, where the nature of the case so requires, by a judge advocate, an independent legal adviser to the court.

A general court-martial invariably sits with a judge advocate and is composed of 5 officers. This court-martial tries the more serious cases and has jurisdiction over all persons subject to military law. Both types of court-martial may try civilians abroad if they come within the provisions of the Army Act.¹¹

Courts-martial try those offences specified in the Army Act. These range from disobedience, absence without leave, and desertion, to serious nonmilitary criminal offenses. Section 70 of the Act provides that "any person subject to military law who commits a civil offence whether in the United Kingdom or elsewhere, shall be

⁹In Canada, servicemembers are explicitly permitted to seek redress in the civil courts under § 187 of the National Defence Act. See generally Starkman, *Canadian Military Law: The Citizen as Soldier*, 1965 Can.B.Rev. 414.

¹⁰For an excellent account of the British military legal system, see Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 L.Q.Rev. 478 (1969).

¹¹Army Act, note 5, *supra*, § 209. Note also the establishment of standing civilian courts to try civilians who are subject to military law abroad. Armed Forces act, 1976, note 5, *supra*, § 6.

guilty of an offence against this section.”¹² A soldier who assaults or steals from another soldier may therefore be tried by court-martial¹³ for that criminal offence under Section 70. A finding by such a court-martial will be treated as if it were made by a civil court,¹⁴ and so any conviction will be notified to the Criminal Record Office.¹⁵ Courts-martial findings are subject to confirmation by the officer who convened the particular court, and legal advice is available from the office of the Judge Advocate General.

A convicted soldier may present a petition to the confirming officer and subsequently the case may be reviewed by higher authority.¹⁶ He may appeal against his conviction to the Court-Martial Appeal Court. A soldier sentenced to imprisonment will serve his sentence in a civil prison whilst one sentenced to detention, if of sufficient duration, will be committed to the Military Correction Training Centre. There are approximately 1600 to 1800 courts-martial held each year in the British army.¹⁷

III. APPEAL FROM COURTS-MARTIAL

Not until 1951 did a soldier convicted by a court-martial have a right to appeal to any civilian court of appeal. However, the ques-

¹²In accordance with I 70(4) of the Army Act, note 5, *supra*, a court-martial has no jurisdiction to try the offences of murder, manslaughter, or rape, if committed within the United Kingdom. See *R. v. Gordon-Finlayson ex parte an Officer*, 1 K.B. 171 (1941). See also *Re Mackey and the Queen*, *Re Kevany and the Queen*, 78 D.L.R. 3d 655 (1977).

¹³See *R. v. Kirkup*, 34 Crim. App. 150 (1950).

¹⁴That is to say, a “court of ordinary criminal jurisdiction.” Army Act, note 5, *supra*, I 225(1). *Autrefois* convict (formerly convicted) and *autrefois* acquit (formerly acquitted) are also available as pleas in bar against a second prosecution for the same offense. *Id.*, §§ 133(1), 134(1). Privileges of witnesses are described at *id.*, I 100. The rules of admissibility of evidence are the same for courts-martial as for civil courts. *Id.*, § 99.

¹⁵Report of Select Committee, H.C., Paper No. 429, at 131 (1975–76) (hereinafter cited as “S.C.”).

¹⁶See Army Act, note 5, *supra*, §§ 113, 114. A soldier may not seek the help of the Parliamentary Commissioner for Administration, or Ombudsman.

¹⁷Report of Select Committee, note 15, *supra*, at para. 30.

tion of whether a right should be granted had been considered and rejected previously by a number of governmental committees. This was because it was felt that the military legal system could, through confirmation, petition and review, correct errors that had arisen in any case. To this day a soldier may not appeal to the Court-Martial Appeal Court on grounds of sentence alone, because the military authorities are considered the best judges of the levels of punishment that ought to be imposed.

The Courts-Martial (Appeals) Act¹⁸ now governs the rights and formalities of appeal and it follows closely the pattern set in appeals from civilian courts, although leave to appeal must be given by the Courts-Martial Appeal Court even on a point of law on which there is an automatic right of appeal in civilian cases. The judges are drawn exclusively from those persons who are eligible to sit in the Court of Appeal (Criminal Division), and so it is truly a civilian court. Further appeal may, as in a civilian case, be taken to the House of Lords.

Before 1951 the only way in which a civilian court¹⁹ could consider the findings of a court-martial was by way of the prerogative writs of certiorari, prohibition or mandamus²⁰ or by habeas corpus proceedings. However, there have been very few occasions on which a civilian court, whether the High Court acting in its supervisory capacity or the Court-Martial Appeal Court, has considered a case arising from a court-martial.²¹ Between 1970 and 1979 there were no reported cases in the High Court, while the Court-Martial Appeal Court dealt with only 65 cases out of approximately 18,000 courts-martial hearings.

Without doubt one of the main reasons for the small number of applications for judicial review to the High Court is the emergence

¹⁸This statute was enacted in 1968.

¹⁹At that time the High Court of Justice would have performed this function.

²⁰These three writs are now termed "applications for judicial review."

²¹Rare usage of judicial review is not unique to the United Kingdom. For a United States example, see Gellhorn, Summary of Colloquy on Administrative Law, 6 J. Soc'y. Pub. Tchrs. L. 70, 72-73. Professor Walter Gellhorn was on the faculty of Columbia University School of Law from 1933 to 1974.

of the Court-Martial Appeal Court as a body able, *inter alia*, to correct errors of law. An appeal to this court, as will be seen below, avoids the need for a soldier to argue that the error has taken the court-martial outside its jurisdiction and that his "civil rights" have been affected by the sentence of the court-martial.

It is, however, still important to consider on what basis an application for judicial review may be made to the High Court. Such application will be the only means of seeking the intervention of a national civilian court where a soldier has been convicted by his commanding officer, or where the Court-Martial Appeal Court, in the case of a soldier convicted by a court-martial, has refused leave to appeal and the soldier seeks an alternative means of challenge.

IV. JUDICIAL REVIEW OF COURTS-MARTIAL FINDINGS

The wide statement of Kelly, C.B., in *Dawkins v. Lord Rokeby* in 1866²² that "cases involving military duty alone are cognisable only in military tribunals and not by a court of law" never gained wide approval. It was the product of a confusion of thought over different types of action. The precursor of this view was said to be the judgment of Lords Mansfield and Loughborough in *Sutton v. Johnstone*.²³ That case involved a claim for damages in which their Lordships found for the defendant on the ground that there existed a reasonable and probable cause for the prosecution of the plaintiff by court-martial. Their Lordships had not drawn any distinctions between a claim for one of the prerogative writs, a claim for damages alleging that the defendant had acted without jurisdiction, or a similar claim alleging malicious abuse of authority within jurisdiction.

²² L.R. 8 Q.B. 225, 271. Some support for the *Dawkins* decision may be found in *R. v. Army Council ex parte Ravenscroft*, 2 K.B. 504 (1917). "Civil courts cannot be invoked to redress grievances arising from persons both of whom are subject to military law." *Id.* at 512 (Ridley, J.).

²³ 1 Term Rep. 784 (1786). This decision has been labeled "the fountain of increasing ambiguity." *Heddon v. Evans*, 35 T.L.R. 642 (1919) (McCardie, J.). The facts occurred *flagrante bello*. See also *Barwis v. Keppel*, 2 Wils. K.B. 314 (1766).

Indeed, in relation to a claim for prohibition, Lord Loughborough in 1792²⁴ stated that:

military courts-martial . . . are . . . liable to the controlling authority, which the courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them.²⁵

The decisions of *In re Mansergh*²⁶ and *R. v. Secretary & State for War, ex parte Martyn*,²⁷ eighty-eight years apart, both emphasize that the High Court has jurisdiction over a court-martial where the latter has acted without or exceeded its jurisdiction. However, they restrict this supervisory function to cases where the "civil rights" of the soldier are affected.

To decide when an inferior tribunal can be said to be acting without or is exceeding its jurisdiction has been particularly difficult. If a court-martial purported to try a person who was not subject to military law, or if it exceeded its sentencing powers given by the

²⁴Grant v. Gould, 2 H.B1. 69 (1792).

²⁵*Id.* at 100. See also *In re John Poe*, 5 B. & Ad. 681 (1833).

The original difficulty . . . of putting the clergy on the same footing as laymen was at least as great as that of establishing the supremacy of the civil power in all matters regarding the army.

Albert v. Dicey, Introduction to the Study of the Law of the Consitution 310 n.3 (1885). Albert Venn Dicey (1835-1922) was an English barrister and served as the first Vinerian Professor of English Law at Oxford University from 1882 to 1909. The constitution referred to is, of course, the British one.

²⁶1 B. & S. 400 (1861).

²⁷1 All E.R. 242 (1949); *R. v. Murphy*, 2 I.R. 190, 224, 10 H.E.L. 382 (1921); 2 Man.Mil.L. 402-3. Cf. cases *flagrante bello*, n.23, *supra*.

The Manual of Military Law is currently in its twelfth edition (1972) and for the British armed forces is analogous with the Manual for Courts-Martial, United States, 1969 (Rev. ed.). A Civilian Supplement to the Manual of Military Law was published in 1977. Two chapters of the Queen's Regulations for the Army (as amended, 1975) also deal with law, chapter 6 with military justice, and chapter 7 with civil law matters.

Army Act, it would clearly be so acting. Many of those cases concerning army personnel that have been considered by a supervising court have raised the issue of whether a person is subject to military law.²⁸ If the court has decided that the applicant was so subject, his claim has failed.

However, in *R. v. Governor of Wormwood Scrubs ex parte Boydell*,²⁹ an officer was released from prison by way of habeas corpus. He argued successfully that he was not subject to military law when he was arrested and tried by court-martial on a charge of conversion. The High Court held further that, in so far as an Army Order of 1945 declared him to be subject to military law, it was inconsistent with the Army Act of 1881 and therefore void.³⁰

Lord Goddard, C.J., in *Martyn* gave a very limited interpretation of "jurisdiction" by declaring that "once it is conceded, as it has been in this case, that he was a soldier, a court-martial had jurisdiction to try him."³¹ Having made this point, his Lordship further stressed that breaches of procedure could never take the court-martial outside its jurisdiction but could only be dealt with by the convening officer or by the Judge Advocate General. But, with respect, whether a person is or is not subject to military law cannot be the sole content of "jurisdiction," since it only determines whether a court-martial may begin to hear a particular case and does not take into account any fundamental errors that may occur subsequently.

²⁸ *R. v. Secretary of State for War, ex parte Martyn*, 1 All E.R. 242 (1949); *R. v. Secretary of State for War, ex parte Price*, 1 K.B. 1 (1949); *R. v. O.C. Depot Battalion R.A.S.C., ex parte Elliott*, 1 All E.R. 373 (1949); *Queen v. Cuming and Another, ex parte Hall*, L.R. 19 Q.B.D. 13 (1887); *Re William Flint*, 15 Q.B.D. 488 (1885); *In re Mansergh*, 1 B. & S. 400 (1861); *In the matter of Capt. Douglas*, 3 Q.B. 825 (1842); *Wolfe Tone's Case*, 27 St. Tr. 614 (1798); *Grant v. Gould*, 2 H.B.1. 69 (1792); and *R. v. Tubbs*, 2 Cowp. 512 (1776) (press-gang).

²⁹ 2 K.B. 193 (1948); *Re Governor Sabine*, in *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774).

³⁰ *Id.*

³¹ *R. v. Secretary of State for War, ex parte Martyn*, 1 All E.R. 242, 243. See generally Denys C. Holland, *The Law of Courts-Martial*, 3 Curr. Leg. Probs. 173 (1950).

The earlier case of *The Queen v. Murphy*³² had considered whether a court-martial exceeded its jurisdiction in misapplying the laws of evidence but held that such an error was not fatal to jurisdiction. Cockburn, C.J., in *Mansergh*,³³ was of the opinion that the civil courts could intervene if the court-martial "either acted without jurisdiction or has exceeded its jurisdiction." The disjunctive nature of this statement would suggest that different types of error were contemplated.

Further, the procedural rules of the British Army provide that the accused, "before pleading to the charge, may offer a plea to the jurisdiction of the court,"³⁴ and the *Manual of Military Law*³⁵ gives examples of such pleas. These would include where an accused claims that he is not subject to military law, that the charge against

³² 2 I.R. 190 (1921). Cf. *R. v. Nst Bell Liquors*, [1922] A.C. 128. Whether a court-martial had exceeded its jurisdiction through errors in the admissibility of evidence was also discussed in *Grant v. Gould*, 2 H.Bl. 69 (1792), and *Mutineers of the Bounty* (see in *The King v. John Suddis*, 1 East. 306 (1801), and *R. v. Murphy*, 2 I.R. 190 (1921)). See also *Heddon v. Evans*, 35 T.L.R. 642, 649 (1919); *Mann v. Owen*, 9 B. & C. 596 (1829). See Rules of Procedure (Army) 1972, Rule 95(6).

³³ 1 B. & S. 400, 406-7 (1861). It has been stated that breaches of procedure by courts-martial are not to be judged as strictly as in civil courts. *Heddon v. Evans*, 35 T.L.R. 642, 647-8 (1919) (McCardie, J.); *In re John Poe*, 5 B. & Ad. 681 (1833); *Grant v. Gould*, 2 H.Bl. 69 (1792). But *quaere* whether this holds true when a judge advocate is present.

³⁴ Rules of Procedure (Army) 1972, Rule 36(1)

³⁵ 1 Man.Mil.L. 710 n.2 (12th ed. 1972); Army Act 1955, pt. II. See also Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum.L.Rev. 40 (1961), and the strange case of Privates Arnold and Anthony.

As World War II was drawing to a close, two Army privates were tried and found guilty of raping a German national. The Government's case had some serious evidentiary and procedural weaknesses, and the two men later sought writs of habeas corpus from prison. Anthony's writ was granted by a Kansas court. *Anthony v. Hunter*, 71 F.Supp. 823 (D. Kan. 1947). Arnold's writ was denied by a Texas court. *Arnold v. Cozart*, 75 F. Supp. 47 (N.D. Tex. 1948). Professor Bishop uses the cases as a springboard for a discussion of the various theories concerning civilian judicial review of court-martial convictions.

Professor Bishop has been on the faculty of Yale Law School since 1957, and retired from the Army JAGC reserve as a colonel in 1964. He is the author of the book *Justice Under Fire* (1974).

him has not been investigated by his commanding officer in the prescribed manner, or (if the court is a District Court-Martial) that he is not under the command of a convening officer. This is clearly not an exhaustive list of errors that might rob a court-martial of jurisdiction and, it is suggested, Lord Goddard's refusal to look further than the initial question of jurisdiction would not gain acceptance if the issue were to be raised afresh.³⁶

Breaches of the rules of natural justice have been held to take a tribunal outside its jurisdiction,³⁷ but now according to the Court of Appeal any error of law may be regarded as creating grounds for judicial review. Lord Denning, M.R., in *Pearlman v. Harrow School*³⁸ said that:

no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.³⁹

According to the Army Act, the rules of admissibility of evidence to be observed at a court-martial are the same as in civil courts in England.⁴⁰ Hence the wrongful admission or rejection of evidence would, if the decision of the case depended upon it, and Lord Denning's view is followed, render the case susceptible to judicial review. Whether this revolutionary approach, which leads to the absurd conclusion that "there is jurisdiction if the decision is right and none if it is wrong,"⁴¹ will gain further judicial approval is not yet clear. If it does receive such approbation it overlaps with the jurisdiction of the Court-Martial Appeal Court and widens, in theory, the basis of civilian court intervention in the military legal system.

³⁶ *Anisminic Ltd. v. The Foreign Compensation Commission*, 2 All E.K. 208 (1969).

³⁷ *R. v. Exeter Crown Court, ex parte Beattie*, 1 All E.R. 1183, 1186 (1974) (Lord Widgery, C.J.).

³⁸ 1 All E.R. 365 (1979).

³⁹ *Id.* at 372; Professor H.W.R. Wade, Note, 95 L.Q.Rev 163 (1979)

⁴⁰ Army Act, note 5, *supra*, § 99(1)

⁴¹ *R. v. Nat Bell Liquors, Ltd., A.C.* 128, 151 (1922) (Lord Sumner).

Where a soldier seeks judicial review and his complaint relates solely to his military status or his conditions of service, his civil rights are not affected and the courts will not consider it. These matters have been held nonjusticiable since a soldier serves "only for so long as her Majesty shall so require his services" and not under a contract of service.⁴² It must be remembered that a court-martial does not merely determine guilt or innocence but it also represents the soldier's employer and of course the employer may dismiss or reduce a soldier in rank without resort to it.⁴³ A soldier could not, for instance, challenge a conviction and sentence of a court-martial indirectly by a claim in the courts for back pay.⁴⁴

The "civil or fundamental rights" of a soldier must therefore relate to his common-law rights *qua* citizen, of which military law does not divest him, and which refer to his life, liberty or property.⁴⁵ Almost⁴⁶ all the previous cases for certiorari, prohibition or

⁴²2 Man.Mil.L. 353; *Leaman v. R.*, 3 K.B. 663 (1920); *In re Tuffnell*, L.R. 3 Ch. D. 164 (1876); *Zelman Cowen, The Armed Forces of the Crown*, 66 L.Q.Rev. 478 (1950).

⁴³*In re John Poe*, 5 B. & Ad. 681 (1833).

⁴⁴The pay of a soldier sentenced to detention will be stopped and, if the soldier is reduced in rank, he may suffer considerable financial loss.

Servicemembers in the United States may seek back pay in the federal courts. See LTC Thomas M. Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 Mil.L.Rev. 1, 30 (1974). LTC Strassburg, now deputy staff judge advocate of the 9th Infantry Division, Fort Lewis, Washington, was an instructor in the Administrative and Civil Law Division, Judge Advocate General's School, Charlottesville, Va., 1975 to 1978. The article cited was originally a master of laws thesis.

⁴⁵*In re Mansergh*, 1 B. & S. 400, 406-7 (1861) (Cockburn, C.J.). See also *R. v. Institutional Head of Beaver Creek Correctional Camp ex parte McCand*, 2 D.L.R. 3d 545 (1969); *Orloff v. Willoughby*, 345 U.S. 83 (1952).

In the last cited case, Dr. Stanley J. Orloff was drafted into the U.S. Army at the time of the Korean War. Though a physician, he was not commissioned because he refused to state whether he was a member of the Communist Party. Orloff applied for a writ of habeas corpus, arguing that, since the Army would not employ him as a physician, it had no authority to keep him on active duty. The Supreme Court, affirming two lower courts, held that the granting of a commission was a matter solely within the discretion of the President, and that, as Orloff's induction was not unlawful otherwise, the writ could not be issued. *Id.* at 90-94.

⁴⁶*Cf. R. v. Secretary of State for War ex parte Price*, 1 K.B. 1 (1949).

mandamus have involved purely military offences, which may explain the courts' reluctance to intervene. If the conviction by court-martial is for a criminal offence, it is suggested that there is no justification for refusing to review on the grounds that a soldier's civil rights have not been affected. If civil rights are distinct from military rights, conviction of a criminal offence is quite distinct from one of a purely military offence and it must affect civil rights.⁴⁷ In military offence cases it would be necessary to consider the ordinary incidents of military life to judge whether a soldier has been deprived, without authority, of his liberty.⁴⁸

If none of a soldier's civil rights are affected by the decision of a court-martial but there has been a breach of procedure, this can only be remedied by the military authorities or by the Judge Advocate General.⁴⁹

A court-martial held abroad (most likely in West Germany) would appear to create a problem. In *Mansergh*, the applicant was tried by court-martial in India and sought certiorari in England. Justice Blackburn, assuming that the court-martial had no jurisdiction over the applicant, asked, "Can the court quash the proceedings of a court-martial held in India?" His Lordship answered his own question by saying, "No more I think than they could quash the proceedings of a court in France."⁵⁰ But in *R. v. Secretary of State ex parte Price*,⁵¹ Lord Goddard, C.J., in an *obiter dictum*, thought that Justice Blackburn was:

⁴⁷ Holland, note 31, *supra*.

⁴⁸ The normal conditions of military life, not abnormal ones, would have to be considered to determine this. See the text above note 104, *infra*. The Army Act does not use the expression "loss of liberty;" but see S.C., note 15, *supra*, at 160 (1976).

⁴⁹ *R. v. O.C. Depot Battalion R.A.S.C. ex parte Elliott*, 1 All E.R. 373 (1949); *R. v. Secretary of State for War, ex parte Martyn*, 1 All E.R. 242 (1949). If there has been such delay in bringing a man to trial as to amount to oppression, the High Court of Justice could interfere and admit him to bail. *Ex parte Elliott*, 1 All E.R. 373 (1949). See also *Blake's Case*, 2 M. & S. 427 (1814).

⁵⁰ 1 B. & S. 400, 411 (1861).

⁵¹ 1 K.B. 1 (1949).

considering the case . . . where the court might be asked to quash a conviction which had taken place in a country like India or a country like France, in both of which there were courts sitting.

I do not mean to say that this court would necessarily hold that it had no jurisdiction if a court-martial were held in a place where there were no civil courts to which a man could apply, if he was a British subject and tried before a court consisting of British subjects under a British Act of Parliament.⁵²

This may be the case in the British Army of the Rhine, as under the N.A.T.O. Status of Forces Agreement 1951⁵³ the primary right to try soldiers belongs to the sending state in relation to "service-connected" offences.⁵⁴ With regard to all other offences the receiving state has primary jurisdiction but the West German authorities have granted a general waiver, subject to recall, with respect to United Kingdom forces. Consequently, it would only rarely be that the West German authorities would have any jurisdiction over British soldiers and it would therefore be very unlikely that a British court would decline jurisdiction.

⁵²*Id.* at 6.

⁵³Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67; also Cmnd. No. 9363 (1951). This agreement, commonly called NATO SOFA, is implemented within the Federal Republic of Germany by a supplementary agreement, Agreement to Supplement the Agreement of June 19, 1951, Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, with Protocol of Signature, August 3, 1959, [1963] 14 U.S.T. 531, T.I.A.S. 5351, 481 U.N.T.S. 262; also Cmnd. No. 2191 (1963). The NATO SOFA is discussed in Dep't of Army Pamphlet No. 27-161-1, International Law, Law of Peace, Volume 1, at 10-3 to 10-13 (1 Sep. 1979).

⁵⁴NATO SOFA, note 53, *supra*, art. VII (3), 4 U.S.T. 1798, 1800. Note that, although the primary right is in the sending state, jurisdiction is concurrent with the receiving state if the offence is recognized by it. *Id.*

V. SUMMARY JURISDICTION

A commanding officer may exercise summary jurisdiction⁵⁵ over those under his command, and at least since the Army Act 1886 his powers have steadily been increasing. As a result of legislation enacted in 1976,⁵⁶ the commander's power to sentence a soldier to detention is increased from an order of 28 to 60 days and the maximum fine that he can impose is increased from 14 to 28 days' pay. The reasons advanced for this transfer of jurisdiction to a commanding officer were that it would result in a speedier disposal of cases and it would reduce the numbers of courts-martial.⁵⁷ Where a commanding officer wishes to invoke these increased sentencing powers given by the 1976 Act, he must seek permission of higher authority. Moreover, the case must be one in which the accused does not dispute either a material fact or that the facts amount to the offence charged.⁵⁸

In the exercise of his summary powers, the commanding officer may record a finding of guilt to impose a punishment involving loss of liberty or pay. If he so intends, the commander is required by law to give an accused soldier the option to elect to be tried by court-martial.⁵⁹

⁵⁵See generally, 1 Man.Mil.L. ch. 2, paras. 21, 22; Report of Select Committee, H.C. Paper No. 367, paras. 603 *et seq.*, 787 (1971). For a contrasting picture of Royal Naval summary disposal, *see id.*, app. 22; S.C., note 15, *supra*, app. 12, n.5 (1976); H.M.S.O., Queen's Regulations for the Army, paras. 5.202, 6.070-6.078 (1975); Stuart-Smith, note 10, *supra*; Rowe & Jetha, *The Armed Forces Act 1976*, 40 Mod.L.Rev. 444 (1977); Rules of Procedure (Army) 1972, rule 8. The punishments that a commander can impose are detention, fine, reprimand, stoppage of pay, and other minor punishments.

⁵⁶Armed Forces Act, 1976, *amending in part* Army Act, 1955.

⁵⁷S.C., note 15, *supra*, at vi (1976)

⁵⁸See Armed Forces Act, 1976, § 5, and Army Summary Jurisdiction Regulations, 1972, § 13A

⁵⁹Army Act, § 78(5) (1955). It is rare for a soldier to elect trial by court-martial. S.C., note 55, *supra*, para 635 (1971). Soldiers seem to prefer summary disposal. S.C., note 15, *supra*, paras. 544, 547 (1976). In *Heddon v. Evans*, 35 T.L.R. 642 (1919), the commanding officer failed to offer the plaintiff the chance to elect, but this did not invalidate the summary proceedings.

A commanding officer may deal with a wide variety of offences, some of which are purely of a disciplinary nature whilst others are distinctly criminal.⁶⁰ On a charge laid under § 70, Army Act,⁶¹ he may deal⁶² with §§ 1(1) (theft) and 12 (taking a conveyance) of the Theft Act 1968; § 1(1), Criminal Damage Act 1971⁶³ (where the amount of the damage does not exceed 150 pounds); unlawful possession of a controlled drug under § 5(2), Misuse of Drugs Act, 1971; and certain offences under the Road Traffic Act, 1972. It is therefore misleading to consider the commander's function as being merely to administer discipline (as distinguished from exercise of criminal jurisdiction). Moreover, by § 134, Army Act, a soldier may not be charged again, whether by the military or by the civil authorities, with any offence which has been the subject of a summary finding.

If a soldier does not elect to be tried by a court-martial and is found guilty by his commanding officer, there is no appeal to any court, although his case may be reviewed by the military authorities.⁶⁴ The finding or sentence may be quashed or varied where it appears to the military authorities that there is a mistake of law in the proceedings, or that anything has occurred in them which would involve substantial injustice to the accused.⁶⁵ Summary proceedings involve no legally qualified persons, although a commanding officer may, and in some cases must, seek guidance from the Directorate of

If an accused has elected to be tried by court-martial, his punishment is not for that reason to be increased. Queen's Regulations for the Army, Para. 6.121 (1975). *Cf.* Magistrates' Courts Act, 1952, § 29, which provides for committal of convicted persons to the Crown Court for sentencing where the powers of magistrates are inadequate.

⁶⁰ Army Act, 1955, I 83; Army Summary Jurisdiction Regulations, 1972, rule 11.

⁶¹ Army Act, 1955.

⁶² Army Summary Jurisdiction Regulations, 1972, Schedule 1.

⁶³ The value of the damage must not exceed UK pounds 150 (about US \$275.00).

⁶⁴ Army Act, 1955, § 115. If the punishment is detention for a period exceeding 28 days, it must be reviewed under I 115 every 21 days. Queen's Regulations for the Army, para. 6.071A (1975).

⁶⁵ Army Act, 1955, § 115(3).

Army Legal Services. An accused soldier is not permitted legal representation at the hearing, the proceedings are not open to the public, and the laws of evidence do not apply.

VI. JUDICIAL REVIEW OF A COMMANDING OFFICER

Is there a valid distinction to be drawn between a finding of guilt by a court-martial and a summary finding of guilt by a commanding officer, so that the former but not the latter may be the subject of judicial review? Such a distinction has been drawn between a board of visitors of a prison (which may adjudicate offences committed by prisoners undergoing sentence), and the governor thereof. In *R. v. Hull Prison Board of Visitors, ex parte St. Germain*,⁶⁶ before the Court of Appeal, Lord Justice McGaw was only prepared to admit the possibility of certiorari issuing to a board of visitors' decision but not to that of the governor. The distinction, according to his Lordship, was not based on logic but on the view of Lord Goddard, C.J., in *Ex parte Fry*,⁶⁷ that it was "undesirable for the civil courts to interfere with the commanding officer's power to deal with certain disciplinary offences in the orderly room"⁶⁸ Lord Justice Shaw, on the other hand, could not "find it easy, if at all possible, to distinguish between disciplinary proceedings conducted by a board of visitors and those carried out by a prison governor,"⁶⁹ while Lord Justice Waller reserved this question.

It is clear from what has so far been said that it is misleading to describe a commanding officer's functions as being merely to administer discipline.⁷⁰ In a sense all proceedings within the military legal

⁶⁶ 1 All E.R. 701 (1979).

⁶⁷ 2 All E.R. 118 (1954)

⁶⁸ *Id.* at 119.

⁶⁹ 1 All E.R. 701, 717-8 (1971). See also *Daemar v. Hall*, Crim. L.R. 317 (1979).

⁷⁰ It was this misleading view that led to "disciplinary proceedings" forming a separate class to which judicial review had no application. See *ex parte St. Germain*, 2 All E.R. 198 (1978) (D.C.); *Ex parte Fry*, 2 All E.R. 118 (1954) (D.C.); *R. v. Metropolitan Police Commissioner, ex parte Parker*, 2 All E.R. 717 (1953).

system attempt to promote discipline. In the *Manual of Military Law*, a court-martial considering a sentence is directed to consider, *inter alia*, that "the proper amount of punishment to be inflicted is the least amount by which discipline can be effectively maintained."⁷¹ Neither the jurisdiction of a court-martial nor that of a commanding officer is limited to purely military offences⁷² (as contrasted with criminal offences charged under § 70 Army Act). Although a commanding officer may not be a "court,"⁷³ he must act fairly⁷⁴ and, at least in those cases where a soldier's civil rights are affected, judicially.⁷⁵

It is submitted that judicial review would lie in respect of summary disposal by a commanding officer⁷⁶ on the same basis as a court-martial, and that "policy and good sense" do not compel a contrary conclusion. The powers of a commanding officer differ⁷⁷ markedly from those of a prison governor or a chief fire officer; and they have

⁷¹ 1 Man. Mil. L. ch. 111, para. 88 (1972).

⁷² By "military offences" is meant those such as absence without leave which do not exist in the civilian sector. These offences are in contrast with criminal offences charged under § 70, Army Act, 1955, which are also crimes under civilian law. The distinction is the same as that found in American military law.

⁷³ *Ex parte Fry*, 2 All E.R. 118, 119 (1954) (Lord Goddard, C.J.). Proceedings conducted by a commander are at least considered "criminal." *In re Clifford and O'Sullivan*, 2 A.C. 570 (1921) (Viscount Cave); *Amand v. Secretary of State for Home Affairs*, 2 All E.R. 381 (1942). Note that, under § 100 of the Army Act, 1955, the privilege of witnesses is available only in courts-martial, not summary proceedings. Also, under § 99 of the same act, the rules of evidence are to be the same in courts-martial as in civilian courts, but this does not apply to a commanding officer conducting summary proceedings. 1 Man. Mil. L. 394 (1972).

⁷⁴ *Fraser v. Mudge*, 3 All E.R. 78, 79 (1975) (Lord Denning, M.R.); *In re Whitelaw and Vancouver Board of Police Commissioners*, 20 D.L.R. 3d 781 (1973).

⁷⁵ The requirements of natural justice may vary, and a right to legal representation may not be admitted in some types of proceedings. *See Maynard v. Osmond*, 1 All E.R. 64 (1977); *Fraser v. Mudge*, 3 All E.R. 78 (1975). *Cf. In re Bachinsky et al.*, 43 D.L.R. 3d 96 (1974).

⁷⁶ *See Daemar v. Hall*, 1979 Crim. L. Rep. 317; *In re Walsh & Jordan*, 31 D.L.R. 2d 88 (1967); *R. v. Archer & White*, 1 D.L.R. 2d 305 (1956). *See also Tellenborn, Prisoners' Rights*, 1980 Pub. L. 74, 87.

⁷⁷ *Cf. Megaw, L.J.*, 1 All E.R. 701, 711, 713 (1979).

recently been increased by Parliament in the Armed Forces Act 1976.⁷⁸ The Army Act lays down a detailed code to guide commanding officers and this code includes power to deal with criminal offences as well as those of a purely military nature. Although summary disposal is a lay proceeding, legal advice is available to a commanding officer through the Directorate of Army Legal Services and in respect of some charges it must be sought. If he wishes to use his extended powers of detention, a commanding officer must first seek the permission of higher authority. One further safeguard that is present at a court-martial, that the finding of guilt and the sentence must be confirmed (with attendant legal advice), is absent from a summary disposal. Further, there is no appeal⁷⁹ from summary proceedings, although it will be recalled, a case may be reviewed.

The need for the maintenance of discipline in any army is axiomatic but it is not advanced by injustice.⁸⁰ A soldier must have confidence in the fairness of his commanding officer and that any errors made will be corrected. Discipline will inevitably suffer if this confidence is lacking and one might expect a larger number of soldiers to elect trial by court-martial⁸¹ and thus frustrate the beneficial ef-

⁷⁸ Amending in part the Army Act, 1955.

⁷⁹ See *R. v. C.O. Morn Hill Camp ex parte Ferguson*, 1 K.B. 176 (1917). In this case, Lord Reading, C.J., stated, "If there were no means of questioning a magistrate's order, there might be some ground for invoking the assistance of this Court . . ." *Id.* at 179. It will be recalled that appeal to the Court-Martial Appeal Court is open only to soldiers convicted by courts-martial. See text at end of section 111, *supra*, of this article, and at note 64, *supra*.

⁸⁰ Cf. Robert Sherrill, *Military Law is to Justice as Military Music is to Music* (1970). Mr. Sherrill was a harsh critic of American military criminal law during the Vietnam era. He states, "One favored military method of conditioning a man into docility is to make trial and punishment not only arbitrary but unpredictable." *Id.* at 63.

If this was ever true, it certainly has not been so for many years. Extensive reforms were in progress at the time Mr. Sherrill's book was published, as a result of the Military Justice Act of 1968, Pub.L.No. 90-632, 82 Stat. 1335. These reforms have been continued in the vigorous activism of the U.S. Court of Military Appeals, and in such developments as the establishment of separate defense counsel corps.

⁸¹ The right of election is set forth in § 78(5), Army Act, 1955.

fects (from the army's point of view) of summary disposal. For there are distinct advantages to the army in transferring powers from a court-martial to a commanding officer. This is so, however, only until the point is reached that the punishments "become so severe that the rights of individuals outweigh the needs of the services with respect to the maintenance of discipline."⁸² Individual cases are dealt with more expeditiously, and this avoids the disturbance to military routine that a court-martial causes.⁸³ Such evidence as there is suggests that this form of disposal is preferred by both soldiers and commanding officers.⁸⁴

Reform of the offender, except in those cases where the soldier is to be dismissed from the service, is of the utmost importance as an aim in sentencing, since the sentencer also represents the employer, and reform may, it is argued, be better achieved by avoiding courts-martial.⁸⁵ Being a discretionary remedy, judicial review of a commanding officer's decision is unlikely to be successful save in the very exceptional case,⁸⁶ and consequently its effect on the maintenance of discipline would be minimal.⁸⁷

⁸²Colonel Harold L. Miller, *A Long Look at Article 15*, 28 Mil.L.Rev. 37, 53 (1 Apr. 1965). In the American military justice system, the commander's powers of summary or nonjudicial punishment are established by article 15, Uniform Code of Military Justice, *codified at* 10 U.S.C. § 815 (1976). Colonel Miller, now assigned to the Army element of the Office of the Chairman, Joint Chiefs of Staff, wrote *A Long Look at Article 15* as a thesis when he was a member of the 12th Career (Graduate) Class at The Judge Advocate General's School, Charlottesville, Va., academic year 1963-64.

Readers may also want to examine an article by a student at Columbia University School of Law, Steven E. Asher, *Reforming the Summary Court-Martial*, 79 Colum.L.Rev. 173, 177-8 (1979). The summary court-martial should not be confused with nonjudicial punishment administered by a commander under art. 15, U.C.M.J. The summary court-martial is governed by arts. 16, 20, and 24, U.C.M.J. The commander does not serve as the summary court-martial except under very unusual circumstances. Art. 24(b), U.C.M.J.; 10 U.S.C. § 824(b) (1976).

⁸³See S.C., note 55, *supra*, para. 609 (1971). The question was put to about 100 commanding officers whether they wished their summary powers to be increased. Seventy percent were in favor of increase. *Id.* para. 793; S.C. para. 547 (1976).

⁸⁴*Id.* and note 59, *supra*. See also *Heddon v. Evans*, 35 T.L.R. 642, 648 (1919)

⁸⁵See 1 Man.Mil.L. ch. 111, para. 88 (1972).

⁸⁶In accordance with 0.53, r.1, R.S.C., permission to seek judicial review is required.

VII. AN ACTION FOR DAMAGES

If an individual⁸⁸ (whether a commanding officer or indeed members of a court-martial) acts without or in excess of jurisdiction and commits an assault, false imprisonment, or other common law wrong and a soldier's "civil rights" are thereby affected, he will be liable in damages. This is so even though the injury purports to be done in the course of actual military discipline.

In *Jenkins v. Shelley*,⁸⁹ a chief petty officer sued the captain of his ship who had sentenced him to 42 days detention for an offence of disobedience. The plaintiff claimed damages for false imprisonment, alleging that the captain had exceeded his jurisdiction. Justice Hallet found that the defendant had acted within his jurisdiction, and that the plaintiffs claim therefore failed. He treated

By § 181(2), Army Act, 1955, a soldier may, if he thinks himself wronged in any matter by his commanding officer, make a complaint to the Defence Council. It shall be the duty of the Defence Council to take any steps for redressing the matter complained of which appear to them to be necessary. Army Act, 1955, § 181(3). This is analogous with the complaint procedure available to American servicemembers under art. 138, U.C.M.J.; 10 U.S.C. § 938 (1976); Army Reg. No. 27-14, Legal Services: Complaints Under Article 138, U.C.M.J. (1 Feb. 1979).

Quaere, whether any action taken by the Defence Council may be the subject of judicial review. *Congreve v. Home Office*, 1 All E.R. 697 (1976); *Padfield v. Minister of Agriculture*, etc., 1 All E.R. 694 (1968).

Failure by a soldier to exhaust all remedies open to him may result in refusal of permission under 0.53(1), R.S.C., to seek review. *See R. v. Hull Prison Board of Visitors, ex parte St. Germain*, 1 All E.R. 701 (1979).

⁸⁷For the effect of judicial review on the totally different atmosphere of a prison, *see R. v. Hull Prison Board of Visitors, ex parte St. Germain*, 1 All E.R. 701, 717, 725 (1979) (Shaw and Waller, L.J.J.). Suits against federal and state prison officials are commonplace in the United States, where prisons commonly have law libraries and the prisoners are normally permitted to proceed *pro se*, in *forma pauperis*.

⁸⁸The individual in question may be a commanding officer or, indeed, a member of a court-martial.

⁸⁹1 All E.R. 786 (1939).

*Heddon v. Evans*⁹⁰ as authority to show that, if the captain had acted *outside* his jurisdiction, an action for damages would lie. If discipline would be adversely affected by an application for judicial review, *a fortiori* it would be in an action for damages against the commanding officer himself.

VIII. EUROPEAN CONVENTION ON HUMAN RIGHTS

It is probable that, when the European Convention on Human Rights⁹¹ was drafted, contracting states never considered⁹² wheth-

⁹⁰ 35 T.L.R. 642 (1919).

Lawsuits in which actions of military authorities have been successfully challenged include *Boyce v. Bayliffe*, 1 Camp. 58 (1807), and the cases cited in *Warden v. Bailey*, 4 Taunt. 67, 70, 71, 75 (1811). According to Justice McCardie in *Heddon v. Evans*, 35 T.L.R. 642 (1919),

Only one tribunal, the House of Lords, is free to hold that an action will lie for the malicious abuse of military authority [within jurisdiction] without reasonable and probable cause.

Id.; *Fraser v. Balfour*, 34 T.L.R. 502 (H.L.) (1918); *Richards v. Naun*, 3 All E.R. 812, 815 (1966) (Lord Denning, M.R.). Note also Army Act, 1955, § 142.

⁹¹ The full title of this treaty is European Convention for the Protection of Human Rights and Fundamental Freedoms. The document was signed at Rome on Nov. 4, 1950, and it entered into force on Sep. 3, 1953. It has been supplemented by five protocols and an Agreement of May 6, 1969, Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights. The Third Protocol, dated May 6, 1963, and the fifth Protocol, dated Jan. 20, 1966, amended the text of the original convention on March 8, 1951.

The English text of the Convention and other documents may be found in A.H. Robertson, *Human Rights in Europe* 294-319 (2d ed. 1977), and in L. Mikaelson, *European Protection of Human Rights* 186-210 (1980). An analysis of the text is presented in F. Castberg, *The European Convention on Human Rights* (1974). See note 97, *infra*, concerning procedures.

⁹² A.H. Robertson, note 91, *supra*, 57. France alone had the foresight to enter a reservation concerning the nonapplication of the Convention to national law dealing with military discipline. Specifically, the French government stated that Articles 5 and 6 of the Convention should not be permitted to interfere with those pro-

er the convention would apply to purely military discipline offences.⁹³

The European Court of Human Rights in the case of *Engle and Others*⁹⁴ considered the applicability, *inter alia*, of Article 5, which deals with freedom from unlawful detention, and Article 6, concerned with the right to a fair trial, of the Convention.

visions of French law dealing with discipline in the French armed forces. *See also* the separate opinion of Judge Bindschedler-Robert in the European Court case of *Engel et al.*, Series B, Vol. 20, at 52 (1978). The *Engel* case is discussed at length in the text following note 94, *infra*.

It is understood that, prior to ratification of the Convention by the United Kingdom on March 8, 1951, no one in the British government thought to refer the text of the Convention to the Ministry of Defence to draft a reservation concerning military discipline.

By Art. 4(3)(b) of the Convention, military service is recognized as not being inconsistent with the convention. Note also Art. 1 of the Convention.

⁹³The distinction between purely military or disciplinary offenses, on the one hand, and offenses recognized as crimes under civilian law, on the other hand, is equally clear in all national legal systems. For example, under the Dutch Military Discipline Act of 1903, a number of what might be considered purely disciplinary or military offences were also made distinct criminal offenses in a civilian sense. A much clearer distinction is drawn in the British Army Act, 1955, especially in § 70 thereof.

In the American Uniform Code of Military Justice, all the military offenses and civilian crimes are collected together without distinction in fifty-eight punitive articles (Arts. 77 through 134, U.C.M.J.). These punitive articles together comprise subchapter X of Title 10, United States Code (1976). Examination of the Table of Maximum Punishments, Section A, does not reveal that the maximum permissible punishments for military offenses are, on the whole, either more severe or less severe than those permitted for civilian or common-law crimes. Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 127c.

⁹⁴Judgment of 8th June 1976, Series A, No. 22; J. Andrews, 1975-6 *Eur. Law. Rev.* 589; 1976-77 *B.Y.I.L.* 386; *Engel et al.*, Series B, Vol. 20 (1978). *See also* *Eggs v. Switzerland*, *Applic.* No. 7341/76.

The text of the relevant portions of Art. 5, European Convention on Human Rights, is as follows:

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

Five Dutch soldiers had been dealt with by their respective commanding officers by way of disciplinary but not criminal proceedings. By Dutch law it was permissible to challenge before a confirming officer the punishment imposed by the commander. If the punishment has not been quashed by the former, the complainant may appeal within four days to the Supreme Military Court, a tribunal composed of two civilian judges and four military officers. This court cannot increase the penalty imposed.

(1)(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
...

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 6 in so far as it is relevant states:

(1) In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society.

(3) Everyone charged with a criminal offence has the following minimum rights. ...
...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...

The punishments as they stood after disposal by the Supreme Military Court ran through the range of those available. While under light arrest, a soldier is confined to barracks (although at the relevant time⁹⁵ an officer could serve his punishment in this quarters), but he is not excluded from performing his ordinary duties.

Those subject to aggravated arrest (a penalty that could not be imposed on officers) could not freely move about the barracks in off-duty hours, whilst those under strict arrest were locked in a cell and prevented from performing their normal duties. The most severe form of disciplinary penalty was confinement to a disciplinary unit, two of the five soldiers concerned being so sentenced. All the applicants submitted that their punishments were in contravention of Article 5, which proscribes deprivation of liberty except in accordance with the six exceptions set out in Article 5(1).

The Court found that no deprivation of liberty occurred in relation to light or aggravated arrest since it was necessary to consider liberty in the light of the ordinary incidents of military life. A penalty that would offend Article 5 in relation to a civilian might not have this effect if imposed on a soldier. In those forms of arrest only the applicants' movements had been restricted.⁹⁶ The applicants were still able to continue their ordinary military duties. But strict arrest and committal to a disciplinary unit clearly came within the prohibition in the article, and had to be justified under it.

By Article 5(1)(a), detention is permitted if it results from a conviction by a competent court. In relation to the committal to a disciplinary unit, the Dutch Military Discipline Act, 1903, provided that the original sentence (by the commanding officer) should be suspended if appeal were made to the Supreme Military Court. When that court confirmed the punishment, it was considered to be imposing it *de novo*. Consequently, the Court of Human Rights found that the detention of the soldiers so committed was the result of a conviction by a competent court. The lawfulness of committal to a dis-

⁹⁵In 1974, a Dutch Act of Parliament abolished the punishments of strict arrest and committal to a disciplinary unit.

⁹⁶The Court declared that "the right to liberty [is] related to individual liberty in its classic sense, that is to say, the physical liberty of the person" (para. 58). See also Article 2 of the Fourth Protocol to the Convention.

ciplinary unit consequently depended on the fortuitous event of the applicants appealing against their sentences to the Supreme Military Court. The requirement for exhaustion of domestic remedies contained in Article 26 would, of course, prevent a soldier from bypassing that court and petitioning directly to the European Commission.⁹⁷

The strict arrest of Engel clearly could not be justified by Article 5(1)(a), as the Supreme Military Court merely varied the punishment actually imposed by his commanding officer, that sentence not being suspended in effect on appeal to that court. Neither did Article 5(1)(b) justify the strict arrest. This provides that "the lawful arrest or detention of a person . . . in order to secure the fulfilment of any obligation prescribed by law" is a justification for depriving a person of his liberty. The Court considered that this provision could only be invoked in order to compel a person to fulfil a specific and concrete obligation which he has until then failed to satisfy.⁹⁸ The declared:

A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration . . . it would justify, for example, administrative internment to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.⁹⁹

⁹⁷See Eur. Court H.R., *Ringeisen Case*, Judgment of 16th July 1971, Series A, No. 13, pp. 36-39. An individual first petitions the European Commission and, if there is no settlement following the commission's declarations, the case may then be referred to the Court of Human Rights.

⁹⁸See *Lawless* (1960-61) Series B pp. 63-64, *Lawless Judgment* of 1st July 1961, Series A, No. 3, p. 51; *Engel et al.* Series B, Vol. 20, at p. 28, para. 69 (1978); Eur. Court H.R., *Ireland v. U.K.*, Judgment of 18th January 1978, Series A, No. 25, p. 74, para. 195. Cf. *Belgian Gendarme Case* (1966), unpub., discussed in F. Castberg, *The European Convention on Human Rights* 94 (1974). In that case, a quartermaster was placed in arrest as a disciplinary punishment. The Commission held this justifiable under Article 5(1)(b).

⁹⁹*Engel et al.*, Series B, Vol. 20, p. 28, para. 69 (1978). The punishment also exceeded that permitted under Article 5(1), because it was of longer duration than permitted by Dutch law. It was not therefore a punishment "prescribed by law."

In a separate opinion, Judges O'Donoghue and Pederson considered, however, that Article 5(1)(b) applied directly to members of the armed forces. The military discipline code, according to this view, is a vital and constituent part of the army. The special importance to the army of the maintenance of discipline clearly distinguishes this obligation from that imposed on a civilian to obey the law. Acceptance of this argument by a majority would have amounted to the Court adopting a "hands off" approach to the whole question of the enforcement of military disciplinary offences.

Further, there was no breach of Articles 5 and 14 taken together. The applicants had complained that it was not permissible under the Convention to make any distinctions between servicemen based on rank. Article 14 refers, *inter alia*, to "status" (in French, "situation"). It will be recalled that aggravated arrest and committal to a disciplinary unit were punishments that could not be imposed on officers and in fact the latter could only be imposed on private soldiers. But the Court held that such distinctions were permitted by the Convention, as each rank bore different responsibilities. For the maintenance of discipline, distinct methods suited to each category were necessary:

While only privates risked committal to a disciplinary unit, they clearly were not subject to a serious penalty threatening the other members of the forces, namely reduction in rank.¹⁰⁰

One argument that the Court did not accept was that Article 5(1)(a) of the Convention was subject to Article 6.¹⁰¹ In other words, detention under the former would only be justified if the requirements of the latter were complied with. Now Article 6 involves only cases concerning the determination of civil rights and obligations or criminal charges. Military discipline offences are therefore not caught by the requirements of Article 6 unless they are objec-

¹⁰⁰ At p. 31, para. 72. Article 14 states: "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

¹⁰¹ See note 76.

tively¹⁰² of a criminal nature. If Article 6 does not apply to objective military disciplinary offences, then neither (according to this argument) will Article 5 (1)(a). The Court was content to say that, in relation to those soldiers committed to a disciplinary unit, they did not fail to:

receive before the Supreme Military Court the benefit of adequate judicial guarantees under Article 5(1)(a), an autonomous provision whose requirements are not always co-extensive with those of Article 6.¹⁰³

Finally, in relation to Article 5, whilst the ordinary conditions of service life may be considered (as they were in relation to the question whether there had been any "deprivation of liberty"), the voluntary nature of submission to the special needs of the armed forces does not act as a waiver of those rights guaranteed in the Convention. In the *Vagrancy Cases*, the Court confirmed that the right to liberty in a democratic society is too important to be waived; "detention might violate Article 5 even though the person concerned might have agreed to it."¹⁰⁴ The first matter to be decided in relation to Article 6 was whether the offences with which the applicants were charged were "criminal charges" and thus attracted the protection of that article. It will be recalled that a distinction has been drawn between disciplinary and criminal offences. In the armed forces of all the contracting states this distinction occurs, and each state applies its own classification. Some offences can only be considered as disciplinary, others as only criminal; but there is a broad category of "mixed" offences where discretion can be applied by the prosecutor to charge an offence as criminal or not.¹⁰⁵

¹⁰²It is not for the state to determine, for the purposes of the Convention, whether an offence is of a criminal or military character. *Quare* whether the term "civil rights and obligations" would cover purely disciplinary offences. Domestic law categorisation would not be conclusive.

¹⁰³Engel et al., Series B, Vol. 20, p. 28, para. 68. See further, F. Castberg, note 91, *supra*, at 103.

¹⁰⁴Eur. Court H.R., De Wilde, Ooms and Versyp Cases, Judgment of 18th June 1971, Series A, No. 12, p. 36.

¹⁰⁵See, for example, Army Act, 1955, § 62, concerning forgery of an official document.

The Court was clear that the decision whether an offence related to a "criminal charge," and consequently whether Article 6 applied, was not one for the state concerned but for the Commission or the Court.

If the contracting states were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will.¹⁰⁶

Criminal charges are those which by their nature, duration, and manner of execution are appreciably detrimental.

Engle's strict arrest for 2 days was not considered to be a "criminal charge" because of its short duration.¹⁰⁷ He had in fact served it before his case came before the Supreme Military Court. But those committed to a disciplinary unit faced "criminal proceedings" and so came within the provisions of Article 6, despite being charged only with disciplinary offences. Such a finding did not, however, compel

No such discretion exists under the American Uniform Code of Military Justice. However, the same result could be achieved through the instructions given by the convening authority to a court-martial convened by him.

In principle, a general court-martial can impose any lawful punishment, including the death penalty or life imprisonment. U.C.M.J. art. 18; Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 14b. However, the convening authority has it within his power to refer a capital case (i.e., one for which the death penalty is authorized) as non-capital. *Id.*, paras. 14a, 15a(3).

With a few exceptions, offenses corresponding to common-law felonies can be referred to special courts-martial, whose sentencing powers are much more limited than those of general courts-martial. *Id.*, para. 15b; U.C.M.J. art. 19. In effect, the special court-martial is the misdemeanor court of the American military justice system. This is not to say, however, that serious military offences are more likely to be referred to a special court-martial than are civilian-type criminal offences.

¹⁰⁶Engel et al., Series B, Vol. 20, p. 34, para. 81.

¹⁰⁷*Cf.* Judge Cremona, in a separate opinion, considered that the nature of the punishment overrode its duration. *Id.* at p. 52.

the Dutch military authorities to proceed against the applicants under criminal procedure, a procedure less favorable to them. (The initial hearing would then have been before a court-martial.) These applicants were thus entitled to a fair¹⁰⁸ and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Did the hearings before the Supreme Military Court comply with these requirements? The majority of the Court thought so, despite their finding a breach of Article 6(1) in the fact that the hearings were held *in camera*. The fact that the Supreme Military Court is not a trial court of first instance was considered irrelevant; it cannot be said that a criminal charge has been determined until it is final and the time for appealing has expired.¹⁰⁹

The Court also found no breach of Article 6(3)(c) when lawyers for the applicants before the Supreme Military Court were restricted to the legal aspects of the case. It was stated:

This restriction could nonetheless be reconciled with the interests of justice since the applicants were certainly not incapable of personally providing explanations on the very simple facts of the charges levelled against them.¹¹⁰

But Judge Evrigenis, who gave a separate opinion, felt that this restriction on the activities of defence lawyers had a much greater effect and went so far as to prevent the Supreme Military Court being a judicial body corresponding to the concept of a court.

The breaches of the disciplinary code that resulted in two of the applicants being committed to a disciplinary unit consisted of publishing an issue of *Alarm*, a publication of the Conscript Servicemen's Association (Vereniging van Dienstplichtige Militairen

¹⁰⁸This implies an "equality of arms." See generally, Eur. Court H.R. Delcourt case, Series A, No. 11, Judgment of 17th January 1970, p. 14, para. 25.

¹⁰⁹See also the Delcourt case, *id.*

¹¹⁰Engel *et al.*, Series B, Vol. 20, p. 38, para. 91. The Court found no breach of Article 6(1)(d). For the text of Article 6, see note 94, *supra*.

V.V.D.M.).¹¹¹ This organisation aimed at safeguarding the interests of conscripts. Previous issues of *Alarm* had been permitted by the applicants' commanding officer but in respect of this particular issue the Court found no breach of Article 10. This was because Article 10(2) justified restrictions on freedom of expression when that was necessary for the "prevention of disorder," and the term "disorder" had a wide meaning in the context of the armed forces. The Court summed up its attitude on this point by declaring that "the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings." Further, "disorder in the [armed forces] can have repercussions on order in soldiers as a whole."¹¹² But, as previous publications of *Alarm* had been permitted, the restrictions on publication of the relevant issue and the punishment of those involved with it were seen as an abuse of the right of freedom of expression rather than as a deprivation of that freedom itself.

In the light of the jurisprudence of the European Court of Human Rights, it would appear that the process of summary disposal by a commanding officer in the British army may not fully comply with the obligations imposed upon the United Kingdom by the Convention. This will not affect, however, the legality in England of the current domestic legislation, since the obligations imposed by the Convention do not apply directly to individuals in national law.¹¹³ Nevertheless, there is clearly a duty upon a state to enact enabling

¹¹¹ See E. Krendel, *European Military Unions*, which is ch. 8 of E. Krendel & B. Samoff, editors, *Unionizing the Armed Forces* (1977).

¹¹² In Flemish, this organization is called the *Vereniging van Dienstplichtige Militairen*, or V.V.D.M. Engel *et al.*, Series, Vol. 20, p. 41, paras. 98, 100. The V.V.D.M. is discussed in N. Jorg, *Recht voor Militairen* (1979).

¹¹³ See *Malone v. Comm'r. of Police of the Metropolis* (No. 2), 2 All E.R. 620 (1979). In that case, the British court held that telephone tapping or wiretapping is not unlawful in England, although probably prohibited by Article 8 of the Convention. *Id.* at 638. See also *Ahmad v. I.L.E.A.*, 1 All E.R. 574 (1978), and Article 57 of the convention.

During 1980, a Human Rights Bill was introduced in the British Parliament but failed to gain sufficient support. It would have added the terms of the European Convention to English law.

legislation, to bring its national law into line with international agreements to which it is a party.¹¹⁴

Everyone who is deprived of his liberty is entitled to a supervision of lawfulness by a court.¹¹⁵ A commanding officer is not a

¹¹⁴In the Select Committee Report on the Armed Forces Bill, 1976, H.C. Paper No. 429, there is much discussion of the transfer of jurisdiction from a court-martial to a commanding officer. However, there is no mention of the European Convention on Human Rights.

If a member of the British armed forces were to take a case to the European Court, the British Government could argue that existing British military law meets the Convention's requirements because, in every case in which detention is possible as a summary punishment, the accused has the right to elect trial by court-martial. That is, he has the right to insist upon trial by a "competent court" within the meaning of Article 5(1)(a) of the Convention. Compare, however, note 104, *supra*, and note 120, *infra*.

It is possible to construct at least an academic or advocate's argument that the European Convention on Human Rights may conceivably apply to nonjudicial punishment and to courts-martial proceedings among United States forces personnel stationed in the United Kingdom and other Western European countries. The argument would run as follows: The states parties to the Convention are obliged to secure the application of the Convention's protections to all who are within their territory. The United States is not a party to the Convention, but U.S. personnel are stationed on the territory of several states parties. Therefore these states are obliged to ensure that U.S. military justice and administrative procedures meet the requirements of the Convention.

Furthermore, under NATO SOFA, note 53, *supra*, the United States has bound itself to "respect the law" of the various host countries. *Id.* at art. 11, 4 U.S.T. at 1796. A treaty such as the European Convention might be considered local law for purposes of this requirement.

It seems unlikely that such arguments would be taken seriously either by an American court-martial or appellate court, or by the European Commission or Court of Human Rights, in almost all court-martial cases that arise among the U.S. forces in Europe. The only possible exception might be cases in which there is some procedural link between the actions of the United States and those of a host country which is a party to the European Convention. Examples include United States pretrial confinement pending a foreign trial, and possibly foreign arrest and confinement pending transfer of an accused to United States authorities.

¹¹⁵Eur. Conv. on Human Rights art. 5(4). See Eur. Court H.R., DeWilde, Ooms and Versyp cases, Judgment of 18th June 1971, Series A, No. 12, p. 39, paras. 72-73; Ireland v. U.K., Judgment of 18th January 1978, Series A, No. 25, p. 76,

court, and a soldier¹¹⁶ dealt with by him awarded a sentence of detention (that involves a deprivation of liberty)¹¹⁷ is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court. It would appear that it is not sufficient to provide a soldier with the right to bring habeas corpus proceedings.¹¹⁸ Neither would it suffice to argue that he could apply for judicial review, since the High Court's jurisdiction may only be invoked in limited circumstances.¹¹⁹ Further, Article 5(4) does not use the words "appeal" or "review," and the word "court" is in the singular and not plural, which again suggests that there should be supervision without jurisdictional limits. At present, under the military legal system, there is no such supervising court.¹²⁰

para. 200. For discussion of what constitutes a "court," see DeWilde, Ooms and Versyp cases, *supra*, at p. 41, paras. 76 and 78; Eur. Court **H.R.** Neumeister case, Judgment of 27th June 1968, Series A, No. 8, p. 44, para. 24.

¹¹⁶ See *Ireland v. U.K.*, Judgment of 18th January 1978, Series A, No. 25, p. 77, para. 200, where the detainee himself was held not entitled to "take proceedings." *Id.*

¹¹⁷ See Imprisonment and Detention (Air Force) Rules, 1956, as amended, S.I. 1956, 1981.

Note that, if a commanding officer is not a court, nevertheless the accused has the right to elect trial by court-martial in all cases in which detention is possible as a summary punishment. See note 114, *supra*.

¹¹⁸ In the *Ireland* case, note 116, *supra*, the opportunity to bring habeas corpus proceedings did not satisfy Article 5(4) of the Convention. Such proceedings are normally brought after confinement or deprivation of liberty. In the case of summary proceedings conducted by a commanding officer which could lead to detention as a punishment, notes 114, 117, *supra*, the accused has the right to elect trial by court-martial prior to the proceedings.

¹¹⁹ The High Court of Justice has jurisdiction over cases in which a court-martial has acted without or exceeded its jurisdiction. See discussion in text above notes 24–30, *supra*.

¹²⁰ In the light of the DeWilde, Ooms and Versyp cases, Judgment of 18th June 1971, Series A, No. 12, at p. 36, the fact that a soldier has not elected to be tried by court-martial instead of by his commanding officer, may be irrelevant. This would be contrary to the suggestion in notes 114, 117, and 118, *supra*, that this election feature of the British system of summary proceedings does satisfy the requirements of the convention.

It does not appear that there is a demand among the rank and file of the British military establishment for creation of a mechanism of appeal from, or of court su-

If a commanding officer deals summarily with a criminal offence or a disciplinary offence that is nevertheless of a criminal nature, the requirements of Article 6 will come into play. These requirements are not met by the present procedure. It might here be argued that summary disposal of objectively criminal offences by a commanding officer is not a "public hearing by an independent and impartial tribunal." Clearly the hearing is not in public. Further, under present law, the only person who can deal with a case is the commanding officer of the accused. There is no provision in the Army Act to deal with the situation, apart from election of trial by court-martial, where the soldier wishes to allege the partiality of his commanding officer. Further, lack of legal representation not only prevents there being an "equality of arms," but it would appear to fall foul of Article 6(3)(c), which provides that everyone has the right:

to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Not only is legal assistance essential where he wishes to put forward grounds of mitigation and where he seeks advice as to whether to elect trial by court-martial, a soldier without legal representation may find it very difficult to cross-examine witnesses, especially where they are superior to him in rank.

The only final jurisdiction that is permitted to a commanding officer under the Convention is over purely military offences, the punishment for which does not involve any deprivation of liberty. Without doubt court-martial proceedings comply with the requirements of the Convention.

IX. CONCLUSION

The effectiveness of an army as a disciplined body must be weighed against the scrupulous preservation of the rights of those

pervision over, summary proceedings. The present summary system seems to be popular, and the privacy afforded by the proceedings is apparently appreciated. Unfortunately, these facts, if established, would probably not affect the outcome of a challenge to the legality of summary proceedings under the Convention.

who serve in it. Military discipline must be preserved, and to this end it is vital to permit a commanding officer to deal personally with breaches of discipline by those under his command. But it is also important that those powers are not used arbitrarily or incorrectly, and that the possibilities of judicial intervention are not closed.

We have seen that a soldier convicted by a court-martial may appeal to the Court-Martial Appeal Court, and that in theory he may also apply for judicial review to the High Court. A soldier dealt with by his commanding officer has no right of appeal, and there is uncertainty as to whether judicial review is available. How can this situation be improved?

As far as trial by court-martial is concerned, no major reform is required. However, this is not the case with summary hearing before a commanding officer. This is not to suggest that there is at present grave injustice occurring as a result of summary proceedings. Any change proposed is designed to take into account not only the emergent criminal jurisdiction of a commanding officer, but also the obligations of the United Kingdom under the European Convention on Human Rights.

First, a soldier should not be at a disadvantage, so far as judicial review is concerned, compared with a soldier tried by court-martial. This could be provided by statute.

Secondly, to comply with the European Convention, it may be necessary to transfer all criminal jurisdiction to a court-martial. This would require that the punishment of detention (because of its severity) be withdrawn from the range of available sentences that a commanding officer might impose. Where a commanding officer considers, on hearing a disciplinary charge, that lesser punishments than detention would be inappropriate, he should have the power to remand the soldier to a court-martial for sentence only. Alternatively, a soldier who has been deprived of his liberty by his commanding officer should have the right of appeal, by way of a rehearing, to a court-martial. Such an appeal would only rarely be taken, because in most cases the soldier will admit the charge.¹²¹ This pro-

¹²¹ See generally, Paul Lermack, *Summary and Special Courts-Martial: An Empirical Investigation*, 18St. Louis **U.L.J** 329 (1974). Mr. Lermack obtained some

posed right of appeal would further reduce the likelihood of a soldier seeking to invoke the supervisory jurisdiction of the High Court.

Let it not be feared that these proposals will open the floodgates to ceaseless legal proceedings and disturb the delicate balance between military efficiency and the individual rights of soldiers.¹²² It is worth reiterating that, even if such changes are made, it will only be rarely that they would ever be invoked.

of the material for his study from the U.S. Army Judiciary, Falls Church, Va., and from senior Army judge advocates. Apparently a social scientist, Mr. Lermack earned his Ph.D. degree at the University of Minnesota.

¹²²A very valuable report in supplying comparative material is *Recueils de la Societe Internationale de Droit Penal Militaire et de Droit de la Guerre, Septieme Congres Internationale, San Remo, 23-28 Septembre 1976, Les Droits de L'Homme Dan Les Forces Armees*, published in 1978. A number of the papers are either published in English or contain English summaries.

Assuming purely disciplinary offences that do not involve severe punishments (such as detention) fall outside Article 6, disposal by a commanding officer does not infringe the Convention. However, proposals for reform might be made along the following lines: A soldier might be permitted to submit a complaint to the Ombudsman. Alternatively, he might be provided with advice and representation either by a lawyer or a member of a trade union, if such an organisation were to be permitted as in the case of some of the continental armed forces.

The *Recueils* were published by the International Society for Military Law and the Law of War, Brussels, Belgium. The *Recueils* are discussed at length in Publications Note No. 20, 92 Mil. L. Rev. 176 (spring 1981).

LEGAL ASPECTS OF MILITARY SERVICE IN ANCIENT MESOPOTAMIA^{*}

by Victor H. Matthews^{* *}

In this article, Professor Matthews, a historian, discusses military administrative law in the ancient Middle East. Information about this Law has been gleaned by archeologists from clay tablets originally prepared approximately thirty-eight centuries ago. These tablets were the official records of the government of Hammurabi of Babylon, and of the ancient kingdom of Mari.

I. INTRODUCTION

The cuneiform documents unearthed in what was ancient Mesopotamia tell of a seemingly endless series of wars. It was apparently the duty of the kings to (1) establish an undisputed rule over their traditional territory, and (2) expand the boundaries of that territory at the expense of their neighbors. The citizens of Babylon and its allied cities were repeatedly called to war by their sovereigns. The fact that they did not always go gladly is evident from the number of letters and legal pronouncements that have

^{*} This article is based upon a paper presented by the author at the annual meeting of the American Society for Legal History, held in Philadelphia, Pa., in October of 1980.

The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

^{**} Assistant Professor, History Department, Anderson College, Anderson, South Carolina, 1980 to present. Visiting assistant professor of history and religion, Clemson University, Clemson, S.C., 1978-1980. M.A., 1973, and Ph.D., 1977, Brandeis University. Author of *Pastoral Nomadism in the Mari Kingdom, ca. 1830-1760 B.C.*, American Schools of Oriental Research Dissertation Series, No. 3 (1978); *Government Involvement in the Religion of the Mari Kingdom*, 72 *Revue d'Assyriologie* 151-156 (1978); *The Role of the rabi Amurrim in the Mari Kingdom*, 38 *J. Near Eastern Studies* 129-133 (1979); *Pastoralists and Patriarchs*, 44 *Biblical Archeologist* 215-218 (1981). Co-author, with D.W. Young, of *The raison d'être of the sugdum at Mari*, 46 *Orientalia* 122-126 (1977).

been uncovered which deal with the questions of conscription, desertion, and veterans' rights. It will be the aim of this study to discuss some of these documents and the people they were designed to influence.

Prior to examination of the texts, mention must be made of the nature of the materials to be examined. The documents primarily relied upon by the present author are the "Laws of Hammurabi"¹ and letters from the royal archive of Mari.² These both date to the period ca. 1830–1750 B.C. They are government documents and as such present a particular, and at times one-sided, view of their kingdoms on the Euphrates River. This view is distinctly urban, xenophobic, and paternalistic in character.

The bureaucratically-oriented cultures of ancient Mesopotamia were buried as deeply in forms, vouchers, and legal texts as our own culture is today. The large number of legal documents, nearly all following a set form,³ attest to the ordered existence of this civilization. Among the earliest clay tablets (ca. 2500 B.C.) are records of legal transactions involving the sale of slaves, land, and other property.⁴ These individual documents, however, are basically

¹Hereinafter referred to in text and notes as LH.

²Hereinafter referred to in text and notes as ARM.

Mari is the name of an ancient Mesopotamian city near the Euphrates River. Its site, in modern Syria, is presently called Tell Hariri, and is seven miles above Abu Kemal, near the border with Iraq. Mari was populated approximately from 2800 B.C. to 1750 B.C.

Mari was an important political and economic center and was the capital of an independent state before the rise and expansion of the Assyrian and Babylonian empires. Although not as well known as some other ancient cities, Mari is of great interest to archeologists because of the discovery of an archive containing thousands of well-preserved clay tablets bearing cuneiform inscriptions. These tablets provide detailed information about the day-to-day economic, religious, political, and social activities of the city. Jacquetta Hawkes, *Atlas of Ancient Archeology* 176 (1974).

³A. Leo Oppenheim, *Ancient Mesopotamia* 281 (2d ed. 1978). Oppenheim describes this set form or pattern (*ana ittišu*) as it was used to train scribes. *Id.* See also Martin Buss, *The Distinction between Civil and Criminal Law in Ancient Israel*, 1 Proceedings of the Sixth World Congress of Jewish Studies 59–60 (1977), for a discussion of the form of documents in both criminal and civil cases.

⁴A. Leo Oppenheim, note 3, *supra*, 282.

unrelated to the so-called "Law Codes" of Hammurabi and other Mesopotamian kings.

11. LAW CODES AND JUDICIAL DECISIONS

The exact function of the "codes" in ancient society has been a long-standing source of speculation. Suggestions range from "a series of amendments to the common law of Babylon,"⁵ to "a codification and reform, but of a utopian nature."⁶ Most recently, Tikva Frymer-Kensky has described them as "statements of legal philosophy, not prescriptive law codes."⁷

Whether or not the "codes" were used merely as written summaries of traditionally unalterable, although in fact amended, common law, is another matter. There are many existing copies of Hammurabi's laws which date both to his own time and to later periods. Even in the Old Babylonian-era copies there are textual variants. In some cases, these probably reflect attempts to update grammatical changes or they demonstrate variants in the spoken language.⁸ Another indication of the codes' lack of complete rigidity is that some punishments, especially those for theft, which were called for in the "codes," were not carried out.⁹ This may reflect the continued existence of a separate common-law tradition, which in some cases held precedence over the king's pronouncements.¹⁰ It may also be evidence of the fact that individual cases cannot always be dealt with strictly in accordance with the letter of the law.

⁵E. A., Speiser, *Early Law and Civilization*, 31 *Canad. B. Rev.* 866 (1953).

⁶T. Fish, *Law and Religion in Babylonia and Assyria*, 3 *Judaism and Christianity* 40 (1938).

⁷T. Frymer-Kensky, *Tit or Tat: The Principle of Equal Retribution in Near Eastern and Biblical Law*, 43 *Biblical Archeologist* 231 (1980).

⁸J. J. Finkelstein, *A Late Old Babylonian Copy of the Laws of Hammurabi*, 21 *J. of Cuneiform Studies* 42 (1967).

⁹G. Boyer, *Articles 7 et 12 du code de Hammurabi*, 6 *Publications de l'institute de droit romain* 157 (1950).

¹⁰W. F. Leemans, *Some Aspects of Theft and Robbery in Old Babylonian Documents*, 32 *Revista degli studi orientali* 666 (1957).

In any case, it is generally agreed that law was of primary interest to the monarch. It appears that one responsibility of the king was to show evidence to the gods of being a *šar mešarim*, "just king."¹¹ To do this he utilized a gift of the gods, the perception of *kittum*, "justice." The king, of all men, was thereby "capable of promulgating laws that are in accord or harmony with the cosmic principle of *kittum*."¹² Thus, the edicts of the king, *mēšarum* ("rightings"), were intended to address the social and economic needs of his time.¹³

Society does not remain static forever, and there must be some mechanism through which the king can make periodic adjustments in the law. For instance, in the issuing of *simdātu*, standing orders of the king,¹⁴ the monarch could make allowances for needed modifications in legal custom, including tariffs and other current legal matters.¹⁵

It is possible that the legal decisions of the kings of Mari (approximately 15 miles north of the Syro-Iraqi border)¹⁶ are examples of these *mēšarum*. They are designed in some cases to answer appeals from the provincial officials,¹⁷ who generally realize their limita-

¹¹ S.M. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* 24-25 (1970).

¹² See J.J. Finkelstein's note appended to M. Greenberg, *Some Postulates of Biblical Criminal Law*, Y. Kaufmann Jubilee Volume 5-28 (1960).

¹³ S.M. Paul, note 11, *supra*, at 9. See also J.J. Finkelstein, *Ammissaduqa's Edict and the Babylonian "Law Codes,"* 15 J. Cuneiform Studies 91-104 (1961), and N. Bailkey, *Early Mesopotamian Constitutional Development*, 72 Amer. Hist. Rev. 1232 (1967).

¹⁴ J.J. Finkelstein, *The Edict of Ammissaduqa: a New Text*, 63 Revue d'assyriologie et archeologie 58 n.4 (1969); and J.J. Finkelstein, *Some New Misharum Material and its Implications*, 16 Assyriological Studies 233-237 (1967).

¹⁵ Marie de J. Ellis, *Simdatu in the Old Babylonian Period*, 24 J. Cuneiform Studies 78-79 (1972).

¹⁶ A more complete discussion of these texts and their setting is contained in V.H. Matthews, *Pastoral Nomadism in the Mari Kingdom, ca. 1830-1760 B.C.*, American Schools of Oriental Research Dissertation Series, No. 3, at 1-2 (1978).

¹⁷ See A. Marzal, *The Provincial Governor at Mari: His Title and Appointment*,

tions in making decisions.¹⁸ Often, when referring to military personnel, the king's decisions are quite far-reaching and general in scope. This was made necessary by the nature of the loose confederation of city-states and provincial villages which made up the Mari kingdom. A short-sighted or a particularly inefficient bureaucrat could cost the king support at a critical moment.

111. JUSTIFICATION FOR WAR

Perhaps the best way to introduce the legal material on military service is to categorize it according to operations and veterans' rights. Under this latter category will also come the rights of prisoners of war and hostages. Although treaties are technically legal contracts, they have been dealt with at length elsewhere,¹⁹ and really comprise a special legal form. As such, they will not be dealt with here except as they relate to conscription and justifications for war.

The very existence of military service and that anomolous thing called "national defense" are based on the animosities and arguments of leaders. In ancient Mesopotamia, as today, it was appropriate to justify declarations of war and call down divine support.²⁰ Among the reasons given for the outbreak of hostilities were rebellion by a vassal state, reaction to attack, or reprisal for some other wrongdoing.²¹

³⁰ J. Near Eastern Studies 186-217 (1971), and E.A. Speiser, *Authority and Law*, supplement to 17 J. Am. Oriental Soc'y at 12 (1954).

¹⁸ As evidence of this awareness, the letter writers constantly make reference to previous correspondence, and otherwise attempt to cover themselves in almost every letter to the king. Cf. J.-R. Kupper, *Une gouvernement provincial dans le royaume de Mari*, 41 Revue d'assyriologie et archeologie 149-183 (1947).

¹⁹ Both internal and international treaty language and obligation are discussed in M. Weinfeld, *The Loyalty Oath in the Ancient Near East*, 8 Ugarit Forschungen 379-414 (1976).

²⁰ J.M. Sasson, *The Military Establishment at Mari* 2-3 (1969).

²¹ The fruitful imagination of the Hittite king, Muršiliš, in justifying the outbreak of hostilities, is described in V. KoroSec, *The Warfare of the Hittites - From the Legal Point of View*, 25 Iraq 163 (1963).

An example of conscripting the gods as aid in war is found in a letter from Yarim-Lim, the king of Aleppo, to a fellow ruler, Yašub-Yahad of Dér.²² Apparently, Yašub-Yahad had committed some unspecified evil against the king of Aleppo, proving himself to be an ungrateful fiend who would be nothing but a ruler of a dustblown wilderness²³ except for the aid of Yarim-Lim. As he has in the past, Yarim-Lim now proposes to make an example of his enemy:

I swear to you by Adad, god of my city, and by Sin, my personal god, that I shall not rest until I crush you and your land. Now at spring's approach, I shall come and march through the entrance of your gate. I shall (then) demonstrate to you the grievous weapons of (the god) Adad and of Yarim-Lim.²⁴

Such a proclamation, sent in writing to the enemy, was seen as a lawsuit between the gods of the respective sides, to be decided through the ordeal of battle.²⁵

The Assyrian regent of Mari, Yasmah-Addu, has a similar problem in ARM IV, 24, concerning broken treaty obligations. In this remarkable text, a reason is given by the authorities for anti-social activity by a nomadic group, the Turukkeans:²⁶

²²G. Dossin, *Une lettre de Iarim-Lim, roi d'Alep, à Yasub-Yahad, roi de Dér*, 33 Syria 66–67 (1956).

²³Lines 16–18. See A. Marzal, *Gleanings from the Wisdom of Mari* 53–54 (1976), for discussion of the agricultural image of “wind blown dust like chaff.”

²⁴Cf. J. Sasson, *The Military Establishment at Mari* 2–3 and 52 n.3a (1969), for a more complete discussion of this text.

Sasson speculates that the letter's presence in the archive of Mari may be the result of an attempt by Yarim-Lim to keep his ally, Zimri-Lim of Mari, informed about his current affairs. *Id.* Giving fair warning to an ally of an impending military operation serves two purposes. First, it starts a process which may result in call up of needed reinforcements, and second, it demonstrates the no-nonsense stance that serves to remind allies that they are indeed allies.

²⁵V. KoroSec, note 21, *supra*, at 164.

²⁶The fact that the urban authorities so seldom give such an explicit reason for the activities of nomadic groups is worth noting. There is one similar example of this, in ARM VI, 57:4'–7'. In that text, the cause of a raid by the Suteans is attributed

[T]he Turukkeans have (now) been found in the land of Tigunanum. Apparently, they had had a famine, (and) had gone to the land of Hirbazanum. (10) The village of [. . .]-zuri had established a peace treaty with them, and (nevertheless) they have killed a man²⁷ of this village and carried off his family and goods. The village has been destroyed They had had a peace treaty with this village and they have taken from it. (20) This land, whose sympathy Lit., ear) had been turned to them, is hardened (against them, and) has turned into their enemy.²⁸

It is sternly related that no pity is to be shown to them and they now "are constantly hungry."²⁹

IV. LAW ON MILITARY SERVICE

In such an environment of nearly continuous conflict there is a recurring need for fresh troops. As a result, an elaborate conscription process was put into effect to supply the armies of Babylon and Mari. Central to the process in the Mari kingdom was the taking of

to their poor herding practices: "Thirty Suteans, who had allowed their sheep to perish, have prepared for a raid and have now assembled en masse." See also the comment at note 29, *infra*.

²⁷See W.F. von Soden, *Neue Bande der Archives royales de Mari* 22 *Orientalia* 203 (1953), concerning line 12, *Zi-ka-ra-am šum-šu*, "einengewissen Mann."

²⁸This modified attitude is voiced by Jacob after the sacking of Hamor's city by Jacob's sons:

And Jacob said to Simeon and Levi, Ye have troubled me to make me stink among the inhabitants of the land, among the Canaanites and the Perizzites; and I being few in number, they shall gather themselves together against me, and slay me; and I shall be destroyed, I and my house.

Genesis 30:34 (King James).

²⁹J. Sasson, note 24, *supra*, at 10-11, describes the breaking of treaties and the foreseeable result.

Despite the statement that no pity will be shown to this marauding group, there does seem to be some understanding or compassion implicit here. See also the example at note 26, *supra*.

a census, *tebibtum*.³⁰ This provided the authorities with a head count of manpower and also kept the reins of provincial control tight.

There were some problems attendant upon this, however. Some groups, especially among the semi-nomadic tribes which shared the kingdom with its urban citizenry, had reservations (bordering on a phobia) about being counted.³¹ In ARM I, 6:6–12, the Assyrian king Samsī-Addu was confronted with a situation in which a large tribal group was resisting the census. There was a possibility that their intransigence could spark trouble with other tribes. The king's solution in lines 13–21 appears to be a master stroke of diplomacy, using the law in a flexible manner:

Under no circumstances shall you census them. (Rather), give them a strong talking to as follows: "The king is going on campaign. Let every man, including boys, assemble. The *sugāgum* (tribal chieftain), who does not assemble his (allotment of) troops, who allows even a single man to remain behind, will be in violation of the interdict of the king." Give them this ultimatum, but whatever you do, do not cens[us] them!

By instructing the tribal chiefs to assemble the men needed, Šamsī-Addu allowed both sides to save face. The Yaminite tribe could make its own count (according to their ability and desire to supply soldiers) and the government was saved from any official embarrassment or sign of weakness towards the tribes. By placing the responsibility for the successful completion of recruitment upon the "middle management" tribal leader, a convenient scapegoat was then available in case the quota of men for the king's campaign was not met.³²

³⁰J. Sasson, *Treatment of Criminals at Mari*, 20 J. Econ. & Soc. Hist. of the Orient 93–94 (1977). The cited article discusses inconsistencies in the government's administration of the census. In this regard, compare ARM XIV, 63:66 and XIV, 61.

³¹E.A. Speiser, *Census and Ritual Expiation in Mart and Israel*, 149 Bull. Am. Schs. of Oriental Research 25 n.83 (1958).

³²A more modern example of resistance to a census and the role of government officials is found in D.H.K. Amiran, *Nomadic and Bedouin Population in the Census Returns of Mandatory Palestine*, 13 Israel Exploration J. 247–248 (1963).

There are times, of course, when diplomacy will take too long or is ineffective. Thus, in ARM XIV, 64:10–14, the governor of Sagaratum, Yaqim-Addu, laments, “On the subject of the Amnan-ean soldiers of Sahri’s census, I have written their *sugdgum* five times, but they have not come.” In a case like this, recruitment, if it is to happen, may require a small demonstration:

[Let] someone execute a criminal who is in prison. Let his head be cut off and have it paraded among the villages as far as Hutnim and Appan. The troops will be frightened and will quickly assemble . . .³³

The laws of Hammurabi³⁴ also deal with the legal issue of recruitment. In LH 26, it is stated that a soldier may not absent himself from or hire a substitute for a campaign of the king, on pain of death.³⁵ Once again, in a corollary to this law, a heavy burden of responsibility is put on the middle level officials:

If either a sergeant (*dēkūm*) or a captain (*luputtūm*) has obtained a soldier by conscription or he accepted and sent a hired substitute for a campaign of the king, that sergeant or captain shall be put to death.³⁶

There are two things in question here. The first speaks to the matter of hiring substitutes, extending the ladder of responsibility one step further. The other involves the more complicated question of levying troops from exempted categories or from men conscripted for other tasks.³⁷ This could include such groups as temple

³³ ARM 11, 48:15–20.

³⁴ All references to the laws of Hammurabi are taken from J. Pritchard, *Ancient Near Eastern Texts Relating to the Old Testament* (3d ed. 1969).

³⁵ *Id.* at 167. Compare the Hittite law on this subject, which seems to allow the hiring of a substitute with the stipulation that the government would not compensate the mercenary as it would the conscript. LH No. 42, *id.* at 191.

³⁶ LH No. 33, *id.* at 167.

³⁷ G. R. Driver and J. C. Miles, *The Babylonian Laws* 166 (1955).

or palace slaves,³⁸ deserters, or men in some other special military or civilian service. A case involving this latter category is found in ARM I, 78. This text deals with a priest who had been conscripted by mistake. Šamši-Addu orders him back to his more urgent duties in the choir of the god Nergal and seems to reprimand his son for not being aware that the man had other commitments.³⁹

V. CONTROL OF DESERTION

The legal materials have little to say about battlefield law except in respect to deserters and the taking of booty. Once again, the policing of these two areas is left to the non-commissioned officers and tribal chiefs. In the case of desertion, the policy is ambiguous, reflecting an attempt to examine each case.⁴⁰ In some instances, the deserters were arrested⁴¹ so that they could serve as examples to their fellow troops.⁴² However, there are also situations in which troop levels would be further depleted by a heavy-handed treatment of deserters. The local officials were therefore periodically given some leeway in disciplining deserters in an effort to prevent mass defections.⁴³

In ARM XIV, 82:5–22, it is recommended that Hanean deserters not be pursued. There had been some veiled threats of disruptions

³⁸See ARM VI, 40:5–12. This text concerns a challenge against the qualifications of a man to serve in the *bikrum* class of the army on the grounds that he is a palace slave.

³⁹Šamši-Addu repeatedly disciplined his sons, especially Yasmah-Addu, to train them for kingship. The special conscription process connoted here by the phrase *ERIN nisihtum* is described by J.J. Finkelstein, note 8, *supra*, at 47.

⁴⁰J. Sasson, note 30, *supra*, at 93.

⁴¹ARM VI, 35:14–21.

⁴²See the author's treatment of ARM VI, 64, in V.H. Matthews. *The Role of the rabi Amurrim in the Mari Kingdom*, 38 J. Near Eastern Studies 129, 130 (1979).

⁴³ARM XIV, 82:5–22. See also C.H. Gordon, *Šamši-Adad's Military Texts from Mari*, 18 Archiv Orientalni 204 (1950).

and delay of a campaign if this was not agreed to. The king had been warned by a troop spokesman that the Haneans would be “very happy”⁴⁴ if the deserters were allowed to go free.

Many times the sole incentive for a common soldier to remain in the service, other than fear of punishment for desertion, was the prospect of a share of the loot taken in enemy territory. The problem inherent in this rather common procedure, however, is determining what is a fair share for the officers and enlisted men. There are tempting possibilities for abuse of this **privilege**.⁴⁵ It is therefore not surprising that the king of Mari put his own position as legal administrator on the line to guarantee a just division of the spoils. To make it a doubly solemn matter, the gods are also invoked as witnesses to this decree of the king:

[T]he general, scribe of the Amorites, captain, or sergeant who deprives a soldier of his booty has committed sacrilege against Dagan, Iturmer, Šamši-Addu, and Yasmah-A[ddu].⁴⁶

The text is meant as a warning and threat to persons in authority who may be tempted to abuse their power and confiscate the booty captured by a soldier. If such a thing were to happen, they could then expect to incur the wrath of both heaven and earth.

Still, the realities of battlefield avarice are not always overcome by law or divine curse. In ARM V, 72, there is described the case of a soldier, Yawi-Addu, who had broken into a temple during a mili-

⁴⁴ARM XIV 82:22.

⁴⁵The opening of Homer's *Iliad* showcases the problem of the division of spoils in its depiction of the feud between Agamemnon and Achilles over the girl Briseis and the prerogatives of a commander **as** against his chief lieutenant.

⁴⁶The implications of this “taboo” are discussed in both F. Thureau-Dangin, *Asakku*, 38 *Revue d'assyriologie et archeologie* 41–43 (1941), and A. Marzal, *Mari Clauses in “Casuistic” and “Apodictic” Styles*, 33 *Cath. Biblical Q.* 333–364, 492–509 (1971). For a tie-in with the language and style of such royal threats, see M. Buss, note 3, *supra*, at 61.

tary campaign.⁴⁷ This particular temple had previously been declared off limits by the king's command.⁴⁸

During the course of Yawi-Addu's trial, his immediate superior, Qarradu, had apparently tried to eliminate him in a summary manner, proclaiming that "he was not to be spared."⁴⁹ However, Yawi-Addu managed to force an appeal of his case to the king. His main defense in this appeal was not a denial of his guilt. On the contrary, he raises the issue which is always in the minds of enlisted men in regard to their officers, "Did not Qarradu take [also from the booty]?"⁵⁰

VI. HOSTAGES AND PRISONERS OF WAR

Once hostilities had begun, the fighting was often quite fierce, with towns leveled and hundreds of prisoners taken away to serve as forced labor or to be held for ransom.⁵¹ Hostages were sometimes kept during interim negotiations. However, if the fighting broke out again or seemed to be inevitable, orders could come that they "should prepare their graves. . . ."⁵² Expediency is not hampered by any sort of legal "hand-wringing" concerning the hostages.

Apparently, one of the major hazards of military service was being taken prisoner. The agriculturally based cultures of Mesopotam-

⁴⁷J. Sasson, note 30, *supra*, at 93.

⁴⁸Compare the similar case of Achan, son of Carmi, described in Joshua 7. Achan also took booty (a Babylonian garment, two hundred shekels of silver, and a wedge of gold of fifty shekels weight). Joshua 7:21. The booty was taken from a restricted area (the spoils of the conquered city of Jericho, whose silver and gold were reserved for the Lord). Joshua 6:19. Unlike the case of Yawi-Addu, Achan paid for his crime with his life and the lives of his family. Joshua 7:24-25.

⁴⁹ARM V. 72:5.

⁵⁰ARM V, 72:19.

⁵¹I.J. Gelb, *Prisoners of War in Early Mesopotamia*, 32 J. Near Eastern Studies 72-73 (1973), and I.J. Gelb, *From Freedom to Slavery*, 18 Rencontre assyriologique internationale 86-87 (1972).

⁵²ARM I, 8:5-17. A more complete discussion of this hostage situation is provided at J. Sasson, note 24, *supra*, 49.

ia found it economically advantageous to take and keep⁵³ large numbers of prisoners to serve as forced laborers. Prisoners could also provide a welcome addition to the city coffers through the payment of ransom for their return.⁵⁴

A. PROPERTY OF ABSENT PRISONERS

The majority of the texts dealing with soldiers taken prisoner of war by the enemy involve the legal disposition of the prisoner's feudatory property and obligations during his absence. There was apparently a standard arrangement made with soldiers to insure their loyalty and continued service which granted them title to land. This agreement established a specified rent, which probably included a portion of the crop in addition to periodic military service.⁵⁵

This was a feudatory grant and thus not assignable or inheritable, except under strictly supervised conditions and with the consent of the king.⁵⁶ An example just how seriously this was taken is found in LH 37:

If a seignior has purchased the field, orchard, or house belonging to a soldier, a commissary, or a feudatory, his contract-tablet shall be broken and he shall also forfeit his money, with the field, orchard, or house reverting to its owner.⁵⁷

⁵³That is to say, feed and house them.

⁵⁴Economic texts from Ur III (ca. 2200 B.C.) which deal with the prisoners' rations of food and clothing are presented in I.J. Gelb, *Prisoners of War in Early Mesopotamia*, 32 J. Near Eastern Studies, at 79 (1973).

⁵⁵The assignment and re-assignment of such plots of land in ARM I, 6:38 and 18:25, is described in C.H. Gordon, note 43, *supra*, 206-207. See also ARM IV, 15-28, for a similar grant of fields.

⁵⁶J. Pritchard, note 34, *supra*, at 167-168. Nearly every possible contingency is covered by LH Nos. 36, 37, 38, and 39.

⁵⁷This could be a very dramatic act, with the clay tablet thrown to the ground to dissolve the contract. The breaking of a tablet was associated with the opening of hostilities. Concerning this, see J. Pritchard, note 34, *supra*, "The Execration of Asiatic Princes," 328.

Such a restriction would prevent forced sales by impoverished soldiers and keep land speculators in check.

So important is this particular matter that the laws of Hammurabi include a special section, designated by its own sub-heading,⁵⁸ set aside as a kind of “veteran’s bill of rights.” In a series of very comprehensive statements, it is made clear that the “field, orchard, (livestock), and house,” which had been assigned to a soldier cannot be sold⁵⁹ or bartered for, even if a down payment has already changed hands.⁶⁰ This property cannot even be lost for failure to uphold feudal obligations, at least within a reasonable period of time.⁶¹

If he (a private soldier or a commissary) has absented himself (on account of the feudal obligations) for only one year and has returned, his field, orchard, and house shall be given back to him and he shall look after his feudal obligations himself.⁶²

The general theme of the laws concerning war captives is that they can expect to be able to reclaim their feudatory grants on their return home. Thus, in LH 27:⁶³

In the case of either a private soldier or a commissary who was carried off while in the armed service of the king, if after his (disappearance) they gave his field and orchard to another and he has looked after his feudal obligations—if he has returned and reached his city, they shall restore his field and orchard to him and he shall himself look after his feudal obligations.

⁵⁸J.J. Finkelstein, note 8, *supra*, at 42.

⁵⁹LH Nos. 35, 36, 37.

⁶⁰LH No. 41.

⁶¹LH No. 31.

⁶²However, according to LH No. 30, if a soldier were deficient in performing his feudal obligations for a three-year period, he would lose control of the property to the man who cared for it during that time period.

⁶³J. Pritchard, note 34, *supra*, at 167.

One additional point worth mentioning in respect to this case is that the land is not to lie idle during the soldier's absence. It is a possession of the state, only lent to the soldier for services rendered, and this is expected to continue to produce, even in his forced absence.

There are several variations on this theme of property utilization. In LH 28 and 29, there are listed two possible options involving the son of the captive. First, if the son is capable of fulfilling his father's feudal obligations, the property will not be entrusted to someone else. However, if the son is a minor, one-third of the property will be given to his mother, as legal guardian, so that she will be able to support him properly.⁶⁴ It is the male heir, in this instance, who is of greater importance to the state. The wife receives her identity in this matter from her son, just as she had previously from her husband.

This sense of the wife as a legal non-person, except as she related to her husband, is further expressed in LH No. 133:

If a seignior was taken captive, but there was sufficient to live on in his house, his wife shall not leave her house, but she shall take care of her person not by entering the house of another.⁶⁵

This is almost a duplicate of the form used to describe feudatory property. The wife appears to be considered chattel, belonging to her husband and, in his absence, to the state. If the above conditions are not satisfied, she is to be given to another man⁶⁶ so that she may continue to produce children for the state.⁶⁷ Then, if the husband should return, he may reclaim his wife⁶⁸ along with the

⁶⁴*Id.*

⁶⁵*Id.* at 171. Corollaries to this appear in LH Nos. 133a through 135.

⁶⁶LH No. 134.

⁶⁷Note 65, *supra*. For a similar statement, *see also* J. Pritchard, note 34, *supra*, "Laws of Eshnunna," No. 29, at 162.

⁶⁸LH No. 135,

rest of his property.⁶⁹ The only proviso to this is that the children of the interim "marriage" remain with the second "husband."

B. RANSOM OF PRISONERS

Being able to return home, however, was not always a sure thing for the prisoner of war. It must have happened often enough to justify the inclusion of several legal statements about it. But there seems to be a limited number of ways to regain one's freedom. A captive could escape, he could be liberated by invading armies, he might be manumitted,⁷⁰ or ransomed.⁷¹ There is evidence of this last possibility in LH 32. This portion of the law describes the manner in which a merchant will be reimbursed for ransoming a soldier:

[I]f there is sufficient to ransom (him) in his (the soldier's) house, he himself shall ransom himself; if there is not sufficient to ransom him in his house, he shall be ransomed from the estate of his city-god; if there is not sufficient to ransom him in the estate of his city-god, the state shall ransom him, since his own field, orchard, and house may not be ceded for his ransom.⁷²

Here we have a graduated scale of responsibility for the soldier, from the individual's holdings, through temple funds, to state revenues. There is obviously a sense of obligation to the veteran, and this must have been of some reassurance to the soldier and his family. There is also a guaranteed incentive for the merchant class, which can generally cross enemy borders without undue hindrance,

⁶⁹ Note 67, *supra*. This legal tradition was continued unchanged into the 12th century B.C. in the "Middle Assyrian Laws," No. 45, J. Pritchard, note 34, *supra*, at 184.

⁷⁰ This option of the holder of a captive was unlikely to be exercised. I.J. Gelb points out, "the manumitted or freed individuals (usually) remained in some state of dependency on their old master's household." I.J. Gelb, note 54, *supra*, at 88.

⁷¹ A ransom of eight shekels of silver for the return of a free man is mentioned in G. Dossin, *Benjaminites dans les textes de Mari*, II Melanges syriens offerts à M. Rene Dussaud 993-994 n.277 (1939).

⁷² J. Pritchard, note 34, *supra*, at 167.

to free captured citizens. In addition, there is again a reference to the sacred character of the feudatory grant which is above the ransom process. It is not to be bargained for by a merchant who might want to take advantage of the prisoners of war.

VII. CONCLUSION

While the amount of legal material dealing with military personnel is somewhat sketchy, a pattern does emerge from the texts. There is a constant need for soldiers to fight the king's wars. Some incentives, such as booty, feudatory grants, and occasional diplomatic blindness, had to be provided in order to insure loyalty and continued service. Abuses did appear in this system, as in any other involving humans, and therefore certain legal limitations and guarantees were necessary to protect both the soldier and society. Collections of legal pronouncements like those associated with Hammurabi of Babylon and the law decrees of the kings of Mari serve this purpose.

BOOK REVIEW

LAWYERS, PSYCHIATRISTS, AND
CRIMINAL LAW: COOPERATION
OR CHAOS*

Huckabee, Harlow M. **, *Lawyers, Psychiatrists, and Criminal Law: Cooperation or Chaos*. Springfield, Illinois: Charles C. Thomas Publisher, **1980**. Pages: xiv, **203**. Price: **\$16**. Publisher's address: Charles C. Thomas, Publisher, **301-327** East Lawrence Avenue, Springfield, IL **62717**.

*Reviewed by Major Susan W. McMakin****

The headnote to a **1979** article in *U.S. News and World Report* entitled "Behind Growing Outrage Over Insanity Pleas" queries whether or not a psychiatric defense is an all-too-easy out for those accused of shocking crimes. Mentioning the highly publicized trials of former San Francisco supervisor Dan White and Chicago mass murderer John Wayne Gacy, the article notes growing public concern that "People are using a plea of insanity to get away with murder."¹

The crimes, however, include those other than murder, and psychiatric defenses today are not limited to insanity pleas. Over the

*The opinions and conclusions presented in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

Attorney at law. A.B., **1948, Harvard University, Cambridge, Ma.; J.D., **1951**, Georgetown University, Washington, D.C. Lieutenant Colonel, JAGC, USAR (retired).

***Judge Advocate General's Corps, U.S. Army Reserve. Associated with the law firm of Mustian, Parker, Tavenner, and Buford, of Richmond, Virginia. B.A., **1961**, Trinity College; J.D., **1969**, George Washington University; M.L.&T., **1980**, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Va.

'*Behind Growing Outrage Over Insanity Pleas*, U.S. News and World Report, May 7, **1979**, at **41** (hereinafter, *Behind Growing Outrage*).

last half century or so, advances in the fields of psychiatry have encouraged numerous courts and legislatures to adopt definitions of legal insanity which are far broader and less precise than the simple right-wrong test which has been utilized for centuries both in Britain and the United States.² Under the rules that currently exist—with marked lack of uniformity among the states and within the federal system—psychiatric defenses are pleaded by defendants accused of various crimes ranging from bank robbery to tax evasion. They are utilized not only to avoid criminal responsibility altogether, but also to introduce testimony tending to show diminished capacity or inability of the accused to form specific intent, or to avoid standing trial, or a combination of these alternatives depending on the jurisdiction and the elements of the offense.

Public confusion is understandable. More critical, and a basic problem of criminal law, however, is the confusion, distrust and conflict that exists between the legal and medical professions and among their members on the question of mental responsibility.

The nature of this problem is considered in detail and from many points of view in a new book entitled *Lawyers, Psychiatrists and Criminal Law, Cooperation or Chaos?* The author, Harlow M. Huckabee, defines *M'Naghten* and the three other major responsibility tests governing the traditional insanity defense and explains the gradual liberalization of *M'Naghten* and its progeny by drawing from a wide range of opinions, both medical and legal. His thesis is that for the past twenty-five years the relationship between criminal law and psychiatry has deteriorated to the point of chaos. This is attributable to several factors, such as non-uniformity of standards among the jurisdictions, the treatment orientation of psychiatrists, the natural tension between defense and prosecution, and so forth. The chaos will continue unless some effort is made to formulate standards or guidelines that are compatible with both legal concepts and psychiatric principles.

Mr. Huckabee suggests no substantive solution—"ideal standard" by which jurists and psychiatrists can determine who is too mentally impaired to be found responsible, to form intent, or to stand trial. Rather, he suggests creation of a forum in which this might be ac-

²The rule is set out in *M'Naghten's Case*, 10 Clark and Fin. 200, 8 Eng. Rep. 718, 722 (1843).

complished, pointing out that appropriate standards and guidelines will never be formulated without combined and continuing efforts by both the legal and medical professions.

Not everyone believes that there is a problem sufficiently grave to warrant a universal review of existing law. On at least two recent occasions, Joseph H. Vargyas, director of the American Bar Association's Commission on the Mentally Disabled, has indicated that insanity is asserted in less than one percent of all felony indictment. The author challenges this figure in his preface, however, and suggests that psychiatrists may be more utilized than generally realized. He suggests that statistics should be developed not only as to insanity pleas, but also as to use of defenses related to diminished capacity and to competency to stand trial, and as to decisions against prosecution based on mental disorders, made by administrative and investigative agencies and by prosecuting attorneys.

Statistics notwithstanding, however, for those who are curious about the current status of psychiatric defenses,—which, as Mr. Huckabee points out, include more than the traditional insanity plea—his brief but comprehensive volume provides a sufficient variety of opinions and theories to enable readers to see the problems and to reach an informed opinion as to what should be done to solve them.

Mr. Huckabee has been involved with the problems of law and psychiatry for over a quarter of a century. His interest in the effect of mental illness on criminal responsibility commenced in 1953 when, as a defense attorney in the Army Judge Advocate General's Corps, he was called to defend the 1954 court-martial of Sergeant Maurice L. Schick. This was an early case in which the effect of diminished capacity on *mens rea*, or intent, was discussed on appeal.⁴ In conjunction with that case, Mr. Huckabee became acquainted with several psychiatrists who at that time espoused the "determinist" theory of human behavior, a point of view which rejects the traditional legal assumption that man chooses between good and evil,

³*Behind Growing Outrage* at 42; Larry Bodine, *Rx Sought for Pleas of Insanity*, *The National Law Journal*, July 23, 1979, at 1.

⁴*United States v. Schick*, 7 C.M.A. 419, 22 C.M.R. 209 (1956).

and which rests upon the premise that man's behavior is molded by forces beyond his conscious control.

Mr. Huckabee's interest in the subject was further piqued when, after leaving military service and joining the Criminal Section of the Tax Division of the Department of Justice in 1956, he found that the defense bar was beginning to assert psychiatric defenses in connection with tax evasion and other "white collar" crimes. For the remainder of his career, Mr. Huckabee was instrumental in the formulation and implementation of the government's procedures in cases defended on mental health grounds. This experience has enabled him to set forth, with remarkable clarity, a neutral and thought-provoking treatise on a complex and controversial subject.

The book is divided into two parts. The first and major portion considers the history and content of the psychiatric defenses currently being utilized by court systems, and the controversy that these concepts have generated—a controversy attributable to differing orientations towards criminal law espoused by the medical and legal professions. The second and shorter section addresses a potpourri of related problems, including competence to stand trial, the competence of psychiatrists to testify in criminal law matters, the shopping for and briefing of the psychiatric witness, and utilization of "impartial experts" or psychiatric court clinics in conjunction with the adversary process.

If the thesis of *Lawyers, Psychiatrists and Criminal Law* is that the relationship between the two professions has been deteriorating for a quarter of century, the underlying theme of the book is that the two professions must cooperate to develop standards for judging mental impairment. Mr. Huckabee does not blame the confusion on the medical profession. He feels that a major cause of this problem is that over the years courts and lawyers have turned *their* responsibility for determining criminal responsibility over to the psychiatric profession. As the author stated in an earlier article, "the courts and psychiatrists seem to agree that the criminal responsibility decision is a legal, social and moral judgment for the jury . . . (yet) psychiatrists continue to dominate in these determinations."⁵

5H. Huckabee, *Resolving the Problem of Domnance of Psychiatrists in Criminal Responsibility Decisions: A Proposal*, 27 Southwestern L.J. 790 (1974).

The history of this continuing problem is set out in the first three chapters of the book. Huckabee first discusses the four major responsibility tests: *M'Naghten*,⁶ irresistible impulse,⁷ *Durham*,⁸ and the American Law Institute (ALI) test.⁹ By the time the reader has finished reading the first two pages he is aware of one facet of the problem—lack of uniformity. For example, fifteen states and all but one federal jurisdiction have adopted the ALI test. The First Circuit and fifteen states utilize *M'Naghten* plus irresistible impulse. About fifteen more states utilize only *M'Naghten*, while the *Durham* test is used in Maine and the Virgin Islands.¹⁰

⁶The *M'Naghten* test requires acquittal if “at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it he did not know he was doing what was wrong.” *M'Naghten's Case*, note 2, *supra*.

⁷The irresistible impulse test is as follows: Although a person can distinguish right from wrong, he is not responsible if his will has been so completely destroyed that his actions are not subject to his will, but are beyond his control. This test was adopted in *Davis v. United States*, 165 U.S. 373 (1897), and in *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887).

⁸The *Durham* test states that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” *Durham v. United States*, 214 F.2d 862, 874–875 (D.C. Cir. 1954).

⁹ALI Model Penal Code, Proposed Official Draft, Sec. 4.01 (1962). The test is as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

(2) As used in this article, the terms “mental disease or defect” do not include any abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The ALI test has sometimes been criticized for the nebulous character of the “lacks-substantial-capacity” language in the first clause, above.

¹⁰The *Durham* test was established in the District of Columbia in 1954. It is said to be similar to a test used in New Hampshire. The District replaced *Durham* with the ALI test in 1972. Harlow M. Huckabee, *Lawyers, Psychiatrists, and Criminal Law: Cooperation or Chaos* 6 (1980).

The author states that “over the years these legal tests for mental responsibility have been the source of major controversy between lawyers and psychiatrists.”¹¹

Several concepts are involved in the controversy. First, the author points out, medical professionals are treatment oriented. As physicians who are dedicated to the welfare of their patients, they are untrained and often unwilling to judge an individual’s morality or to take a position that would hurt another human being.¹² The psychiatrist is interested in finding and treating causes; the attorney is concerned with imputing and rebutting blame.¹³

Secondly, there is the concept of determinism versus that of free will. The determinists believe that a man’s behavior and conduct are molded by individual and social forces beyond his conscious control.¹⁴ The author credits this theory with the erosion of the traditional legal concept that man can make choices between good and evil.¹⁵ Not all psychiatrists espouse the determinist view of human behavior. Nevertheless, when 20th century theories of determinism were brought into the courtroom, the legal tests for insanity were expanded by the introduction of the irresistible impulse test in the late nineteenth century and later by the *Durham* test which would exonerate a defendant whose conduct was proved to be the product of a mental disease or defect.

A third concept is the status of psychiatry as a science. One chapter is devoted to this subject, but throughout the book the author questions how there can be diametrically opposed psychiatric opinions where there is one defendant and one set of facts under consideration. The question arises: Is psychiatry sufficiently scientific for use in criminal law matters? An authority quoted by Huckabee maintains that a fundamental source of dissatisfaction (with psychiatric testimony) is that it casts the expert “in the role of a hired

¹¹*Id.*

¹²*Id.* at 6–8

¹³*Id.* at 103.

¹⁴*Id.* at 8

¹⁵*Id.* at 9.

helper to one of the parties.”¹⁶ One publication describes the psychiatrist’s role in the criminal process as involving “hired guns” who “testify time and again to either buttress a defendant’s insanity claim or to challenge it on behalf of the prosecution.”¹⁷ Dr. Lawrence C. Kolb, former president of the American Psychiatric Association, indicated in a recent article that “in the eyes of the public a diagnosis may seem perverted . . . through a promise of a fee.”¹⁸

But, while greed may be at the root of some expert testimony, the disparate views that mark so many of the trials in which psychiatric defenses are used more likely stem from the fact that different psychiatrists entertain different points of view. As Dr. Saleem A. Shah has stated:

One doctor may have a hardline position that a person has to be pretty sick before it’s mental illness. Another sees mental disability as broad—encompassing such personality disorders as alcoholism and drug addiction.¹⁹

Through presentation of these varying points of view, Huckabee suggests that there is a natural affinity between the conservative psychiatrist and the prosecutor, and between the determinist psychiatrist and the defense bar. The ramifications of this situation are examined in some detail in a chapter in the second part of the book, addressed to the considerations involved in “shopping” for a psychiatric witness under our existing adversary system.

Awareness of the three concepts discussed above leads the reader to an understanding of the various responsibility tests and why they were or were not accepted in certain jurisdictions. Finally, the reader comes to understand how psychiatric defenses were expanded from the comparatively simple question of whether the accused knew right from wrong, to broader formulae purporting to measure

¹⁶*Id.* at 101.

¹⁷*Behind Growing Outrage, supra* n. 2 at 42.

¹⁸*Id.*

¹⁹*Id.* Dr. Shah is Chief of the Center for Studies of Crime and Delinquency, at the National Institute of Mental Health, Rockville, Maryland.

a legally sane defendant's inability to form specific intent due to some mental state or diminished capacity.

In his discussion of the responsibility tests, Huckabee lists the pros and cons of each. He finds that, for the conservative psychiatrist, the *M'Naghten* test is ideal, but that for the determinist it is far too narrow and unrealistic, given the fact of human complexity. Irresistible impulse? To the conservative this is either a nonexistent phenomenon or, if existent, too difficult to establish. Liberal courts and determinist authorities, he finds, attack the irresistible impulse test as too restrictive; they dislike it because it "refers only to sudden, explosive actions and does not cover the allegedly criminal acts of one who is unable to control his conduct following excessive brooding or melancholy."²⁰

Huckabee characterizes the landmark decision of *Durham v. United States*,²¹ decided in the District of Columbia in 1954, as a "major victory for the determinists,"²² and illustrates its purpose and fall from favor by quoting Judge David Bazelon's concurring opinion in *United States v. Brawner*,²³ a case which in 1972 discarded the rule and adopted in its place the American Law Institute test. In *Brawner*, Judge Bazelon said of *Durham* that the court had "acted largely in response to the aversion of behavioral scientists to decide ultimate questions of law and morality, who wanted only an opportunity to report their findings as scientific investigators without the need to force those findings through *M'Naghten*."²⁴

Lastly, the author considers the American Law Institute test. He notes that the determinists dislike it because it is similar to *M'Naghten* and to the irresistible impulse rule, and that it is objectionable from the conservative viewpoint because of its "lacks-substantial-capacity" language.

²⁰ *Wade v. United States*, 426 F.2d 64, 67 (9th Cir. 1979).

²¹ 214 F.2d 862 (D.C. Cir. 1954).

²² Huckabee, note 10, *supra*, at 15.

²³ 471 F.2d 969 (D.C. Cir. 1972).

²⁴ *Id.* at 1010-1011.

According to Huckabee, the trend is towards adoption of the ALI test. Acknowledging that problems have been generated in defining "substantial capacity," he suggests that, nevertheless, ALI is a viable compromise between the determinist and free-will theories,²⁵ and preferable to the *mens rea* approach which he addresses in chapters two and three of his book.

When the ALI test was adopted in 1972 by *Brawner*, the impact of mental disorder on *mens rea* was recognized. As stated in *Brawner*, "Mental condition, though insufficient to exonerate, may be relevant to specific mental elements of certain crimes or degrees of crime."²⁶ This concept was adopted in California in 1959 in *People v. Gorshen*.²⁷ The author discusses why many states have not followed suit.²⁸ He sees an inclination towards its adoption in the fact that Federal Rule of Criminal Procedure 12.2(b) requires notice if a

defendant intends to introduce testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged . . .²⁹

A current question is whether such testimony can be introduced absent the assertion of an insanity plea. The Second, Ninth and Tenth Circuits seem to agree with *Brawner* that evidence of diminished capacity for '*mens rea*' can be introduced even if an insanity defense is not asserted, if the trial court determines that the evidence has sufficient scientific validity to warrant its consideration by a jury in deciding ultimate issues.³⁰

²⁵ Huckabee, note 10, *supra*, at 25.

²⁶ Note 23, *supra*

²⁷ 51 Cal. 2d 716, 336 Pac. 2d 492 (Supreme Ct. Cal. 1959).

²⁸ Huckabee, note 10, *supra*, at 32-33.

²⁹ 18 U.S.C. App. (1976). This rule was effective December 1, 1975.

³⁰ Huckabee, note 10, *supra*, at 35-36; *United States v. Busic*, 592 F.2d 13 (2nd Cir. 1978); *United States v. Bennet*, 539 F.2d 45 (10th Cir. 1976); *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975).

There is, however, no unanimity on the issue. For example, while the United States Court of Appeals for the District of Columbia allowed such evidence in *Browner*, the District of Columbia Court of Appeals refused to allow similar testimony in *Bethea v. United States*³¹ because it was not convinced "that psychiatric testimony directed to a retrospective analysis of the subtle gradations of specific intent has enough probative value to compel its admission."³² In *Hughes v. Matthews*,³³ the United States Court of Appeals for the Seventh Circuit granted a writ of habeas corpus because the Wisconsin court capitulated, holding in the later case of *Schimmel v. State*,³⁴ that competent testimony, not focused on insanity, is probative as to a defendant's state of mind when the crime was committed. Huckabee considers *Hughes v. Matthews* a "classic illustration of the present state of chaos on this subject in the courts."³⁵

Huckabee also points out a critical and frequently misunderstood feature of the *mens rea* doctrine. In jurisdictions where it is recognized, the criminal defendant in effect gets "two bites at the apple". If the mental condition of which he complains does not amount to legal insanity, evidence of mental disease or defect is still admissible on the issue of whether he had the capacity to form the specific intent (*mens rea*) to commit the crime.

This is particularly significant in the "white collar" tax crime area. For example, while the *mens rea* approach might reduce only the degree of a crime such as premeditated murder, federal tax crimes are specific intent offenses to which application of the *mens rea* approach can result in complete acquittal.

An acquittal in a federal tax case, whether by use of insanity or the *mens rea* approach, normally would not result in commitment to

³¹ 356 A.2d 64 (D.C. Ct. of App. 1976), *cert. den.* 433 U.S. 911 (1977).

³² *Id.* at 88, 89.

³³ 576 F.2d 1250 (7th Cir. 1978), *cert. dismissed*, 99 S.Ct. 43 (1978).

³⁴ *Schimmel v. State*, 267 N.W.2d 271 (1978), *overruling* *Hughes v. State*, 68 Wis.2d 159, 117 N.W.2d 911 (1975).

³⁵ Huckabee, note 10, *supra*, at 38.

a mental institution. Apparently the elastic "lacks-substantial-capacity" language of the ALI test permits psychiatrists to opine that otherwise successfully functioning individuals are not responsible for tax crimes.

As Huckabee observes, prior to the widespread use of ALI, the *mens rea* approach was more significant in tax cases because an otherwise successfully functioning individual could hardly claim he did not know right from wrong under *M'Naghten*, and tax crimes do not result from irresistible impulses.³⁶

Obviously, defense attorneys specializing in tax law will favor the treatment-oriented determinist who encourages substitution of *mens rea* for the traditional responsibility tests. In Huckabee's view, however, the framework of a responsibility test (even if it is the fairly liberal ALI test) is preferable, from the prosecution standpoint, to a "wide open" *mens rea* approach, if the traditions of criminal law are to be maintained. The author never really defines the "wide open *mens rea* approach," but perhaps suggests a definition by quoting Professor Peter Arenella of the Columbia Law School to the effect that it is—

a broader, *diminished capacity* approach which admits any evidence showing that the defendant was less capable than a normal person of entertaining the relevant mental state.³⁷

The author probably refers to the broader approach when he uses the expression "wide open." In the third chapter of his book, in discussing various formal and informal proposals to substitute *mens rea* for traditional responsibility tests, Huckabee defines the liberal approach as a view of some psychiatrists who would abolish the insanity test altogether in favor of the *mens rea* approach. Apparently they want to do this because a successfully asserted responsibility test would permit the State to "hold" in a mental institution one incapable of *mens rea*, whereas a defendant acquitted on the basis of another defense could not be incarcerated.

³⁶*Id.* at 40–42.

³⁷Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Colum. L. Rev. 830 (1977).

The third chapter also comments on the 1978 New York study which recommended that the insanity defense be abolished in favor of a defense under which evidence of diminished capacity would be admitted to affect the degree of crime of which an accused could be convicted. Apparently, application of New York's 1965 adoption of ALI in place of the *M'Naghten* test had resulted in an unmanageable number of psychiatric acquittals in mental institutions. Mr. Huckabee thinks that, while incarceration of such individuals in penal institutions might be effective in New York, whose penal system has excellent psychiatric facilities, this might not work in states where such facilities do not exist.

Mr. Huckabee's treatise contains a twenty-two page treatment of the consideration Congress has given, since 1969, to the inclusion of a *mens rea* defense in the Federal Criminal Code.³⁹ The author discusses the liberal or "wide open" versus the objective or strict approach to a *mens rea* defense. He warns that, absent a legal framework,⁴⁰ the *mens rea* defense might be susceptible to varying interpretations and might be inconsistently applied. However, Congressional enactment of a *mens rea* provision in the near future is unlikely; current federal legislation provides that psychiatric defenses will be governed by case law,⁴¹ and the proposed recodification also adopts the ALI test.⁴²

The fourth chapter of Mr. Huckabee's work, entitled "Cooperation or Chaos," deals with the problems of inconsistency, distrust,

³⁸The relevant statute is N.Y. Crim. Proc. Law § 30.05 (McKinney 1975). Articles discussing the effects of the 1965 change include Arenella, note 37, *supra*; Corbett, *The Defense of Insanity*, 29 Brooklyn Barrister 99 (1978); Fingarette, *Disabilities of the Mind and Criminal Responsibility—a Unitary Doctrine*, 76 Colum.L.Rev. 236 (1976); and Pasewark, Pantle, and Steadman, *The Insanity Plea in New York State, 1965–1976*, 51 N.Y.S.B.J. 187 (1979).

³⁹Psychiatric defenses are not discussed in Title 18, U.S.Code, except by implication in Rule 12.2, Fed. R. Crim. P., note 29, *supra*.

⁴⁰Huckabee, note 10, *supra*, at 81 and 86.

⁴¹Federal case law currently applies the ALI test, except in the First Circuit, where a combination of the *M'Naghten* rule with irresistible impulse holds sway. Text at note 10, *supra*.

⁴²Huckabee, note 10, *supra*, at 94–95.

and difference of opinion between lawyers and psychiatrists. There is a generous sampling of comments setting forth views of the legal and psychiatric professions towards their respective callings. One particularly illustrative comment by a lawyer-psychologist merits citing:

I have rarely participated in the rendering of a psychological opinion in regard to a legal issue without being aware that had I been employed by the other side I would have been able to draw different conclusions and defend them quite well.

Further, with each additional experience of testifying and with an increasing awareness of the vulnerability that existed, I became increasingly concerned with the deference that was accorded to me by lawyers and judges who consistently treated me as though they totally believed that I really knew what I was talking about. I knew how shaky were the grounds on which my conclusions rested and I could not understand how lawyers could be so naive as not to be aware of this.⁴³

Mr. Huckabee firmly believes that further efforts are necessary to "establish a sound theoretical basis on which psychiatry and legal science can work harmoniously together."⁴⁴ Noting that in 1952 the American Psychiatric Association initiated the Isaac Ray Award⁴⁵ to improve the relationship between law and psychiatry, he points to the American Bar Association's failure to exert its full power to resolve the conflict between law and psychiatry. Huckabee suggests that the failure may be due to the influence of defense attorneys averse to traditional criminal law guidelines and to standards that would place a greater burden on psychiatrists to demonstrate how

⁴³Jay Ziskin, *Coping With Psychiatric and Psychological Testimony*, at vii (2d ed. 1975).

⁴⁴Huckabee, note 10, *supra*, quoting Jerome Hill, *Psychiatry and Responsibility*, 65 Yale L.J. 763 (1956).

⁴⁵This award is given to a jurist or psychiatrist for a series of lectures at a university having both medical and law schools. Excerpts from several award winning essays are reproduced in Mr. Huckabee's book.

the psychiatric condition could relieve a defendant of responsibility for a crime.

Huckabee recommends that the legal and psychiatric professions develop guidelines and standards via a clearinghouse type of program that could be organized under the new National Institute of Justice.⁴⁶ Mr. Huckabee does not believe that the present piecemeal efforts involving random court opinions and bursts of effort to force legislation is getting the job done.⁴⁷ In suggesting what needs to be accomplished, he draws from various professional sources: for example, from the writings of those who feel that psychiatry should move towards legal concepts⁴⁸ and from authorities like Dr. Gregory Zilboorg⁴⁹ and Dr. Bernard Diamond,⁵⁰ who feel the law should be molded to psychiatric principles.

Huckabee poses many questions. What considerations of legal and medical ethics are involved in the solicitation and rendering of "scientific" opinions under a system which does not utilize adequate standards and guidelines? Is there due process in a system that allows a defendant's case to be influenced by psychiatric opinion based on varying standards measuring the threshold of exculpatory mental impairment? Is an indigent defendant at a disadvantage if his expert psychiatrist is a government employee? Should lawyers

⁴⁶The National Institute of Justice is a federal agency with broad funding and research mandates which exists as a result of a law signed on December 27, 1979. Justice System Improvement Act of 1979, Pub.L.No. 96-157, 5 § 201-204, 93 Stat. 1172-1175, amending 42 U.S.C. 3721-3724.

Another possible forum is the National Center for State Courts, headquartered in Williamsburg, Virginia, and founded in 1971. It is a nonprofit organization dedicated to modernizing court operations and improving justice at the state and local level throughout the country.

⁴⁷Huckabee, note 10, *supra*, at 119.

⁴⁸One such authority is Dr. Seymour Pollack, a forensic psychiatrist at the University of Southern California.

⁴⁹Gregory Zilboorg, *The Psychology of the Criminal Act and Punishment* 112-113 (1965).

⁵⁰Dr. Diamond is the author of *inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Calif.L.Rev. 313 (1980).

and psychiatrists be trained in the concepts of both disciplines? Is federal intervention⁵¹ indicated because the legal and psychiatric professions have failed to solve the problems? Mr. Huckabee is not alone in raising such questions and in advocating cooperation between the two professions.⁵²

In the second part of *Lawyers, Psychiatrists and Criminal Law*, Huckabee notes that, while competency to stand trial (which involves current mental condition) and responsibility for a crime (which involves the mental condition at the time of commission) are two separate concepts, determination of the facts involves the same problems. Standards for briefing are inadequate, psychiatrists differ as to what constitutes the threshold of competency, and defense attorneys and prosecutors naturally have opposing views.

Many of the author's observations are enhanced by personal recollections based on his involvement in the famous case of *United States v. Bernard Goldfine*.⁵³ This defendant had been indicted on tax evasion charges, but was found incompetent to stand trial by three court-appointed psychiatrists in 1960. The government was able to obtain a second hearing in February, 1961, when it was established that the defendant had been actively carrying on business affairs while he was at the St. Elizabeth Hospital in Washington, D.C., undergoing psychiatric examinations relating to his competency to stand trial. As a result of that hearing, in which twenty psychiatrists testified, the defendant was found competent to stand trial.

The second section of Mr. Huckabee's book considers whether psychiatrists can be considered experts in criminal law matters, noting the incompatibility of law and psychiatry, the free-will-versus-determinism dichotomy of psychiatric theory, and psychia-

⁵¹Such intervention presumably would take the form of a grant for research or similar activities from an organization such as the National Institute of Justice. Note 46, *supra*.

⁵²*See*, for example, Dr. Jonas Robitscher's book, *The Powers of Psychiatry*, published early in 1980.

⁵³Crim. Nos. 60-74 and 60-75 (D. Mass. 1961) (hearing before Sweeny, C.J., Feb. 1-9, 1961).

trists' reluctance to form opinions on questions of guilt and innocence. He also questions whether psychiatry is sufficiently scientific to permit its professional members to be classified as expert witnesses.

In his final chapter, the author points out potential problems involved in the courts' use of impartial witnesses and in the psychiatric clinics set up by some courts. Both developments tend to expand the power of psychiatrists in the criminal law area.

The author intentionally avoids comment on the commitment of defendants found not guilty by reason of insanity, and on the quality of treatment and facilities for the mentally disturbed. He concentrates, instead, on the legal issues of his subject, leaving the other matters for a possible future work.

Throughout the book, indeed in every chapter, the author stresses the need for guidelines and standards. With some exceptions, however, his ideas as to what these might be are vague. Nevertheless, given the complexity of his subject, Mr. Huckabee should not be faulted for declining to suggest a "model" or "ideal" standard for the application of psychiatric expertise in the criminal justice arena. The major purpose of *Lawyers, Psychiatrists and Criminal Law* is to present an overview of conflicting opinion that will provide impetus for remedial action. It is notable that the author has quoted from the words of nearly 100 professionals and over fifty court opinions (not to mention books, periodicals, legislation, etc.) in fewer than 160 pages of written text.

This book should interest the legal, medical, and legislative communities who hopefully, will be actively involved in resolving the problems to which Mr. Huckabee calls attention. Meanwhile, the public at large has been provided with a valuable insight into a controversial subject that ultimately affects us all.

BOOK REVIEW:

MILITARY RULES OF EVIDENCE MANUAL¹

Stephen A. Saltzburg,² Lee D. Schinasi,³ and David A. Schlueter,⁴ *Military Rules of Evidence Manual*. Charlottesville, Va.: The Michie Company, 1981. Pages: xvii, 488. Price: **\$35.00**. Index, table of cases, pocket for annual supplement, Publisher's address: Michie/Bobbs-Merrill Law Publishers, P.O. Box 7587, Charlottesville, Va. 22906.

*Reviewed by Major Joseph A. Rehyansky*⁵

Not since the Military Justice Act of 1968 have military lawyers been faced with so sweeping a revision of the rules by which we ad-

¹The opinions and conclusions presented in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency. The book here reviewed was briefly noted at 93 Mil. L. Rev. 139 (summer 1981).

²Professor of Law, University of Virginia School of Law, Charlottesville, Va., 1977 to present. Author or coauthor of various books and articles on evidence and criminal procedure.

³Major, Judge Advocate General's Corps, U.S. Army. Instructor, Criminal Law Division, The Judge Advocate General's School, Charlottesville, Va. 1979 to present. Author of *Special Findings: Their Use at Trial and on Appeal*, 87 Mil. L. Rev. 73 (winter 1980); author of *Military Rules of Evidence: An Advocate's Tool*, published at page 3 of the May 1980 issue of *The Army Lawyer*; and coauthor, with Lieutenant Colonel Herbert J. Green, of *Impeachment by Prior Conviction: Military Rule of Evidence 609*, *The Army Lawyer* at 1, Jan. 1981.

⁴Legal officer, United States Supreme Court, Washington, D.C., 1981 to present. Major, JAGC, U.S. Army Reserve. Instructor, Criminal Law Division, The Judge Advocate General's School, Charlottesville, Va., 1977 to 1981. Author of *The Enlistment Contract: A Uniform Approach*, published at 77 Mil. L. Rev. 1 (summer 1977), and *The Court-Martial: An Historical Survey*, 87 Mil. L. Rev. 129 (winter 1980), as well as two book reviews at 78 Mil. L. Rev. 206 (fall 1977) and 84 Mil. L. Rev. 117 (spring 1979). He has published several articles on criminal law subjects in *The Army Lawyer*, the monthly companion to the *Military Law Review*.

⁵Judge Advocate General's Corps, U.S. Army. Chief, Personnel Actions Office (formerly Career Management Office), Reserve Affairs Department, The Judge

minister justice as with the promulgation in Executive Order No. 12198 of the Military Rules of Evidence. The rules have been, since the date of the Executive Order,⁶ part of the *Manual for Courts-Martial*. Amended in minor respects on 1 September 1980,⁷ the rules are now in effect for all courts-martial conducted by the armed forces of the United States. Prepared by a Department of Defense-level committee, the new Rules are based largely on the Federal Rules of Evidence enacted in 1975, although some major differences endure: Section III concerning exclusion of evidence, and Section V concerning evidentiary privileges. The new Military Rules are of great importance to all attorneys who practice before courts-martial.

Two military attorneys with extensive criminal trial and teaching experience have collaborated with a professor at the University of Virginia School of Law to produce a Manual for these new Military Rules. Majors Lee D. Schinasi and David A. Schlueter, and Professor Stephen A. Saltzburg, have organized their book in accordance with the organization of the Military Rules themselves. The format of the work is similar to that of the *Federal Rules of Evidence Manual*,⁸ prepared in two editions and supplements by Professor Saltzburg, one of the authors of this volume, in conjunction with Professor Kenneth R. Redden, also of the University of Virginia School of Law.

The book opens with an introduction explaining the purposes and use of the work, with background information on the Military Rules, their sources, peculiarities, and practical effects. In the main body of the book, the text of each separate numbered rule is set

Advocate General's School, Charlottesville, Va., 1978 to present. Frequent contributor to *The National Review* and other nongovernmental periodicals. Author of three book reviews published at 75 Mil. L. Rev. 187 (winter 1977), 79 Mil. L. Rev. 199 (winter 1978), and 85 Mil. L. Rev. 155 (Summer 1980.)

⁶March 12, 1980, published at 45 Fed. Reg. 16932 (1980).

⁷Exec. Order No. 12233, 45 Fed. Reg. 58503 (1980).

⁸The second edition was published in 1977 and extensively supplemented in both 1980 and 1981. On the occasion of the publication of the 1980 supplement, the work was reviewed by Lieutenant Colonel Herbert J. Green at 89 Mil. L. Rev. 96 (summer 1980), and briefly noted at 89 Mil. L. Rev. 130.

forth, followed by the authors' editorial comments on the rule, and then by the official drafters' analysis. The editors' comments are generally at least as extensive as the drafters' analysis, and are frequently more so. The tone of the analysis is impersonal and concentrates on description of the sources for each rule in prior law. The editors' comments cover the range of fact situations contemplated for each rule, discuss unresolved issues and ambiguities, and offer suggestions to counsel working under the rules. The comments are precise and relevant, and the prose is crisp. The combination produces a commentary that is easy to read and understand and in which the researcher will not get "bogged down."

The eleven chapters of the book correspond to the eleven numbered sections of the military rules. The text of the rules is presented in large type, the editors' comments in medium-sized type, and the drafters' analysis in type slightly smaller than that of the comments. Rules, comments, and analysis are clearly separated from each other by bold face headings. The format is a refreshing departure from the densely type-set standard legal commentary. Federal and military cases, the *Manual for Courts-Martial*, and other authorities are extensively cited in the text of both comments and analysis. There are no footnotes. A detailed table of contents and a foreword are provided, in addition to the explanatory introduction mentioned above. The book closes with an extensive table of cases cited, and subject-matter index.

The book seems a workmanlike piece of scholarship which will be of substantial assistance to the judge advocates and civilian attorneys who turn to it for guidance in practicing before courts-martial. The proof of the validity of the authors' advice and commentary will come in the next few years, as appellate cases are decided interpreting the rules and establishing a body of precedent for their use. However, I do not fear for the reputations of the authors: Chief Judge Robinson O. Everett⁹ of the U.S. Court of Military Appeals, has stated in the book's foreword:

In performing their respective tasks, those concerned with administering military justice will benefit greatly

⁹ Chief Judge, U.S.C.M.A., 1980 to present; professor of law, Duke University Law School, 1967-1980. For complete biographical information, see the Judge Advocates Association *Newsletter*, June 1980, at 1.

from having at hand the *Military Rules of Evidence Manual* . . . A rule which is not understood cannot be followed. Fortunately, the authors have dedicated themselves to meeting the need for a well-grounded, comprehensive understanding of the Military Rules of Evidence . . . I feel sure that I shall use this Manual often and to advantage . . .¹⁰

¹⁰S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual*, at xii (1981).

BOOK REVIEW:

LEGAL THESAURUS *

William C. Burton, *Legal Thesaurus*. New York City, New York: Macmillan Publishing Co., Inc., 1980. Pages: xii, 1058. Price: \$35.00; student edition, \$19.95. Main entries and index. Publisher's addresses: Orders to Macmillan Publishing Co., Inc., 200-D Brown Street, Riverside, N.J. 08370. Editorial and publication offices: Macmillan Publishing Co., Inc., 866 Third Avenue, New York City, N.Y. 10022.

*Reviewed by Major Percival D. Park ***

In its simplest form, a thesaurus is a collection of synonyms, literally, a "treasury" of words. Thesauri differ from dictionaries in that word derivations are generally not explained, and such definitions as may be found in a thesaurus are connotative or associational, rather than denotative or descriptive. It is sometimes said that, with a dictionary, one looks up a word to discover its meaning, whereas with a thesaurus, one starts with an idea or concept and finds the word which expresses it. Countless writers attest to the value of a thesaurus in helping them find the right word to express some elusive concept.

Most Americans have at least heard of Roget's Thesaurus. Many works by many publishers currently bear this title or some variation thereof. Dozens of editions have appeared since the first was published in 1852 by Peter Mark Roget (1779-1869), an English physician and scholar. Apparently, however, there has never been a

* The opinions and conclusions presented in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency. The book here reviewed was briefly noted at 93 Mil. L. Rev. 99 (summer 1981).

** Judge Advocate General's Corps, U.S. Army, Editor, *Military Law Review*, 1977 to present. Author, "Settlement of Claims Arising from Irregular Procurements," 80 Mil. L. Rev. 220 (spring 1978), and book reviews at 84 Mil. L. Rev. 121 (spring 1979) and 88 Mil. L. Rev. 137 (spring 1980).

thesaurus devoted specifically to *legal* terminology until now. While Roget's contains some legal terms, it barely touches the surface of the specialized modern vocabulary of judges, attorneys, law professors, and students, not to mention the now largely obsolete but once popular Latin phrases that abound in old decisions, treatises, and documents.

The work here noted fills the need for a thesaurus of legal words and phrases. Many terms having exclusively or primarily legal meanings, such as *disseisin* and *foreclosure*, are listed, together and with countless words which may or may not have specialized legal meanings, depending on context. The *Legal Thesaurus* should be a source of delight to Latin scholars, as many entries include examples, sometimes a dozen or more, of the use of the listed word in Latin sentences.

The book is organized in two sections of approximately equal length, Main Entries, and Index. In the first section, words are listed in alphabetical order. For each entry, the part of speech is identified, and a long list of synonyms is provided. Associated legal concepts come next for most entries, and finally Latin phrases and their translations. Words with more than one meaning are given more than one entry, and short definitions are provided. For example, CONTACT (*Association*), *noun*, is separated from CONTACT (*Touching*), *noun*, and both are separated from CONTACT (*Communicate*), *verb*, and from CONTACT (*Touch*), *verb*.

In the second section, Index, synonyms are listed in alphabetical order, followed by the main entries, with one-word definitions where appropriate, under which each synonym is listed. The main entries are also listed as synonyms. The index is thus a means of cross reference between main entries. To continue with the word "contact" as an example, it is stated to be a synonym for coalescence, collision (accident), connection (abutment), convey (communicate), correspond (communicate), impinge, liaison, meeting (encounter), notify, and reach. One could look up each of these ten main entries, and probably find every word in the English language with perhaps some in Latin, that can mean "contact" in any context.

One omission which must be noted is the lack of any specifically *military* legal terminology. Doubtless most of the American legal community has no use for military legal words and phrases. Still, it

would be desirable for *judge advocate* to be listed as a synonym for *attorney* and for *lawyer*. The military term is surely no more exotic than *jurisconsult* and *legist*, both of which appear in both entries. Also *court-martial*, *military judge*, *trial counsel*, *convening authority*, and a few others should be listed under appropriate entries. But in the total picture his omission is minor, and the work is likely to be fully as useful for military legal writers as for others.

The book offers a short table of contents, a foreward by the late Justice William O. Douglas, an introduction providing background information, and a page of graphic explanation, "How to Use This Book." Main entries and index listings are carefully highlighted with bold face and italic type. Main entries are set in two columns per page; index listings, in three columns, with slightly smaller type. Despite the large quantity of material on each page, crowding is avoided by use of large pages, measuring 7% inches by 9% inches. A half space is left between main entries, to promote ease of reading.

The author, William C. Burton, is an attorney. He explains in his introduction that he first realized the need for a thesaurus of legal terms while preparing a legal memorandum in 1974. The words did not flow easily, and he found himself using the same ones repeatedly. He needed a legal thesaurus and was frustrated to learn that there was no such thing. In preparing the *Legal Thesaurus*, Mr. Burton was assisted by Steven C. DeCosta as editor, Michal Hoschander Malen as associate editor, and a staff of consultants and assistants.

Legal Thesaurus should be of value to any legal office whose attorneys do more than occasional writing. Legal assistance officers, government and defense appellate attorneys and judges, specialists in government contract law and administrative law, and doubtless many others could benefit from use of a work such as this.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section 11, Authors or Editors of Publications Noted, and in Section 111, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

11. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Army Training Support Center, *The ATLP Writer/Editor Handbook* (No. 5).

Armywide Training Literature Program, *The ATLP Writer/Editor Handbook* (No. 5).

Bieber, Doris, M., *Dictionary of Current American Legal Citations, Abridged Edition With Examples* (No. 1).

Bock, Bruno, and Klaus Bock, *Soviet Bloc Merchant Ships* (No. 2).

Bock, Klaus, and Bruno Bock, *Soviet Bloc Merchant Ships* (No. 2).

Bologna, Jack, *A Guideline for Fraud Auditing* (No. 3).

Boylan, Ann Marie, and Nadine Taub, *Adult Domestic Violence: Constitutional, Legislative and Equitable Issues* (No. 4).

Charfoos, Lawrence S., and Stephen Fenichell, *Daughters at Risk: A Personal D.E.S. History* (No. 12).

Continuing Legal Education, Office of, University of Kentucky, *Report of Seminar on Law and Aging* (No. 18).

Department of the Army, *The ATLP Writer/Editor Handbook* (No. 5).

Dernbach, John C., and Richard V. Singleton 11, *A Practical Guide to Legal Writing and Legal Method* (No. 6).

Douglas, William O., *The Court Years: 1939-1975* (No. 7).

Dunn, Thomas Tinsley, *A Lawyer's Advice to Retirees* (No. 8).

Edwards, Mary Frances, and Kristine L. Meyer, editors, *Settlement and Plea Bargaining* (No. 9).

Eisenberg, Theodore, *Civil Rights Legislation: Cases and Materials* (No. 10).

Fenichell, Stephen, and Lawrence S. Charfoos, *Daughters at Risk: A Personal D.E.S. History* (No. 12).

Gillett, Mary C., *The Army Medical Department, 1775-1818* (No. 13).

Gordon, Murray, editor, *Conflict in the Persian Gulf* (No. 14).

Higham, Robin, and Donald J. Mrozek, editors, *A Guide to the Sources of United States Military History: Supplement I* (No. 15).

Imwinkelried, Edward J., editor, *Scientific and Expert Evidence* (2d ed.) (No. 16).

Jordan, Amos A., and William J. Taylor, Jr., *American National Security: Policy and Process* (No. 17).

Kaplan, Irving, and Harold D. Nelson, *Dep't of Army Pamphlet No. 550-28, Ethiopia: A Country Study* (No. 23).

Kentucky, University of, Office of Continuing Legal Education, *Report of Seminar on Law and Aging* (No. 18).

Kornhaber, Arthur, and Kenneth L. Woodward, *Grandparents! Grandchildren: The Vital Connection* (No. 19).

Lillich, Richard B., editor, *The Family in International Law: Some Emerging Problems (Third Sokol Colloquium)* (No. 20).

Lillich, Richard B., editor, *International Aspects of Criminal Law: Enforcing United States Law in the World Community (Fourth Sokol Colloquium)* (No. 21).

Meyer, Kristine L., and Mary Frances Edwards, editors, *Settlement and Plea Bargaining* (No. 9).

Mrozek, Donald J., and Robin Higham, editors, *A Guide to the Sources of United States Military History: Supplement I* (No. 15).

Nash, Jay Robert, *Almanac of World Crime* (No. 22).

Nelson, Harold D., and Irving Kaplan, editors, *Dep't of Army Pamphlet No. 550-28, Ethiopia: A Country Study* (No. 23).

Nicolai, Sandra, *et al.*, *Careers in Criminal Justice* (No. 24).

Nicolai, Sandra, *et al.*, *The Question of Capital Punishment* (No. 25).

Office of Continuing Legal Education, University of Kentucky, *Report of Seminar on Law and Aging* (No. 18).

Rosenblum, Victor G., and Frances Kahn Zemans, *The Making of a Public Profession* (No. 29).

Rothstein, Paul F., editor, *Rules of Evidence for the United States Courts and Magistrates* (second edition) (No. 26).

Sapp, Diane E., "Our Mission, Your Future," *The United States Disciplinary Barracks, Fort Leavenworth, Kansas, An Overview* (No. 27).

Singleton, Richard V., 11, and John C. Dernbach, *A Practical Guide to Legal Writing and Legal Method* (No. 6).

Taub, Nadine, and Ann Marie Boylan, *Adult Domestic Violence: Constitutional Legislative and Equitable Issues* (No. 4).

Taylor, William J., Jr., and Amos A. Jordan, *American National Security: Policy and Process* (No. 17).

UNESCO, *UNESCO Yearbook on Peace and Conflict Studies* (No. 28).

United Nations Educational, Scientific and Cultural Organization, *UNESCO Yearbook on Peace and Conflict Studies* (No. 28).

University of Kentucky, Office of Continuing Legal Education, *Report of Seminar on Law and Aging* (No. 18).

Woodward, Kenneth L., and Arthur Kornhaber, *Grandparents/Grandchildren: The Vital Connection* (No. 19).

Zemans, Frances Kahn, and Victor G. Rosenblum, *The Making of a Public Profession* (No. 29).

III. TITLES NOTED

A Lawyer's Advice to Retirees, by *Thomas Tinsley Dunn* (No. 8).

Adult Domestic Violence: Constitutional, Legislative and Equitable Issues, by *Ann Marie Boylan and Nadine Taub* (No. 4).

Almanac of World Crime, by *Robert Jay Nash* (No. 22).

American National Security: Policy and Process, by *Amos A. Jordan and William J. Taylor, Jr.* (No. 17).

Army Medical Department, 1775-1818, by *Mary C. Gillett* (No. 13).

ATLP Writer/Editor Handbook, by *Department of the Army* (No. 5).

Careers in Criminal Justice, by *Sandra Nicolai, et al.* (No. 24).

Civil Rights Legislation: Cases and Materials, by *Theodore Eisenberg* (No. 10).

Conflict in the Persian Gulf, edited by *Murray Gordon* (No. 14).

Court Years: 1939-1975, by *William O. Douglas* (No. 7).

Daughters at Risk: A Personal D.E.S. History, by *Stephen Fenichell and Lawrence S. Charfoos* (No. 12).

Dep't of Army Pamphlet No. 550-28, Ethiopia: A Country Study, edited by *Harold D. Nelson and Irving Kaplan* (No. 23).

Dictionary of Current American Legal Citations, Abridged Edition with Examples, by *Doris M. Bieber* (No. 1).

Ethiopia: A Country Study, Dep't of Army Pamphlet No. 550-28, edited by *Harold D. Nelson and Irving Kaplan* (No. 23).

Family in International Law: Some Emerging Problems ((Third Sokol Colloquium), *edited by Richard B. Lillich* (No. 20).

Grandparents/Grandchildren: The Vital Connection, *by Arthur Kornhaber and Kenneth L. Woodward* (No. 19).

Guide to the Sources of United States Military History, *edited by Robin Higham and Donald J. Mroxek* (No. 15).

Guideline for Fraud Auditing, *by Jack Bologna* (No. 3).

International Aspects of Criminal Law: Enforcing United States Law in the World Community (Fourth Sokol Colloquium), *edited by Richard B. Lillich* (No. 21).

Making of a Public Profession, *by Frances Kahn Zemans and Victor G. Rosenblum* (No. 29).

"Our Mission, Your Future," The United States Disciplinary Barracks, Fort Leavenworth, Kansas, An Overview, *by Diane E. Sapp* (No. 27).

Practical Guide to Legal Writing and Legal Method, *by John C. Dernbach and Richard V. Singleton II* (No. 6).

Question of Capital Punishment, *by Sandra Nicolai, et al.* (No. 25).

Report of Seminar on Law and Aging, *by Office of Continuing Legal Education, University of Kentucky* (No. 18).

Rules of Evidence for the United States Courts and Magistrates (second edition), *edited by Paul F. Rothstein* (No. 26).

Scientific and Expert Evidence, *edited by Edward J. Imwinkelried* (No. 16).

Seminar on Law and Aging, Report of, *by Office of Continuing Legal Education, University of Kentucky* (No. 18).

Settlement and Plea Bargaining, *edited by Mary Frances Edwards and Kristine L. Meyer* (No. 9).

Soviet Bloc Merchant Ships, by *Bruno Bock and Klaus Bock* (No. 2).

UNESCO Yearbook on Peace and Conflict Studies, by *United Nations Educational, Scientific and Cultural Organization* (No. 28).

IV. PUBLICATION NOTES

1. Bieber, Doris M., *Dictionary of Current American Legal Citations, Abridged Edition With Examples*. Buffalo, New York: William S. Hein & Co., 1981. Pages: iii, 233. Price: \$6.50 (paperback). Publisher's address: William S. Hein & Co., Inc., 1285 Main Street, Buffalo, N.Y. 14209.

This work, a pocketbook or handbook in size, is designed to supplement and accompany the well-known authority, *A Uniform System of Citation* (1976), often called the *Bluebook* or *Harvard Bluebook*. The *Bluebook* explains the rule of citation, with some examples and several lists of abbreviations and citation forms. Bieber's work is entirely a list of examples in two columns. The right-hand column on each page lists in alphabetical order a great variety of law reviews and journals, legal newspapers, case reporters, and other recurring legal publications. The left-hand column shows the abbreviation of the publication title, followed by one or more examples of complete citations to particular cases, articles, or pages in the publication.

The *Dictionary* lists most of the publications and citation forms that most legal scholars and practicing attorneys are likely to need. It is probably less useful to the military attorney, however. Listed are West's *Military Justice Reporter*, the Lawyers' Co-operative *Court-Martial Reports*, and the old U.S.C.M.A. official reporter, as well as the *Military Law Reporter* and the Navy's *JAG Journal*. No mention is made of *The Army Lawyer*, the *Military Law Review*, the *Air Force Law Review*, the *Advocate*, the old *Judge Advocate Journal*, or any military regulations, pamphlets, manuals, or other similar materials often cited in military practice. Of course, most of these are not set forth either in the *Bluebook*, from which the *Dictionary* takes its inspiration.

The *Dictionary* here noted is described as an abridgement of a larger work. The editor of the *Military Law Review* has not seen this larger work and has no information about it, except that it was published by Hein in 1979 and sells for \$19.50. It may be that the larger work contains more military citation forms than the abridged edition.

The book offers an explanatory preface for the guidance of users. Typewriter typeface is used, and plenty of space is left between entries to promote ease of reading.

The compiler and editor of this work, Doris M. Bieber, is law librarian at the Vanderbilt Legal Information Center and Law Library, Nashville, Tennessee. She is co-author, with Igor I. Kavess, of "Energy and Congress: An Annotated Bibliography of Congressional Hearings and Reports," published by Hein in 1974. Ms. Bieber is also the compiler of "Dictionary of Legal Abbreviations Used in American Law Books," published by Hein in paperback in 1979 and noted at 86 Mil. L. Rev. 163 (fall 1979).

2. Bock, Bruno, and Klaus Bock, *Soviet Bloc Merchant Ships*. Annapolis, Maryland: U.S. Naval Institute Press, 1981. Pages: 269. Price: \$29.95. Hardcover. Diagrams and tables; alphabetical index of ships; list of sources. Publisher's address: Marketing Department, Naval Institute Press, U.S. Naval Institute, Annapolis, MD 21402.

A country's merchant fleet is a highly valuable asset that should not be taken for granted. Many countries could not survive economically without the flow of seaborne imports and exports. In wartime, mercantile transport of supplies and troops is hardly less important for many countries than their battle fleets. In the United States, the importance of a merchant fleet is often forgotten, because so many America-owned vessels have foreign registration, and because America's need for exports and imports is less obvious, except in the case of oil, than the need of other countries.

The Soviet Union, the several eastern European countries associated with it, and Cuba do not take their merchant fleets for granted. The book here noted provides a description of hundreds of Soviet-bloc vessels, including freighters, tankers, passenger ves-

sels, and fishing boats. Drawings and extensive statistical and historical information are provided.

The *Review* has previously noted three works dealing with naval or merchant vessels. Couhat's *Combat Fleets of the World 1980/81* (92 Mil. L. Rev. 154 (spring 1981)) and Polmar's *Ships and Aircraft of the U.S. Fleet* (93 Mil. L. Rev. 134 (summer 1981)) pertain to navies. Carlisle's *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (93 Mil. L. Rev. 99) discusses some of the problems of foreign registration of a country's merchant vessels.

The book is organized in three sections. Each section is further divided by country, Bulgaria, Cuba, Czechoslovakia, East Germany, Hungary, Poland, Romania, and the USSR. There is also some discussion of COMECON, the organization of the Soviet states that most resembles the European Common Market.

The opening section provides in essay form an overview of each country's merchant shipping, its history, modern development, and recent trends. The second section presents line drawings of each country's merchant vessels, or each type of vessel, seen from the port side. The final section is an alphabetical list of each country's ships by name, followed by statistical information.

For the convenience of users, the work offers an explanatory foreword and preface, a bibliography, and several pages of updating information about new ships which could not be included in the alphabetical index.

Bruno Bock is a journalist and author specializing in matters pertaining to the world's merchant fleets. He has a number of publications to his credit, and is a recognized authority on the merchant marine. His son, Klaus Bock, a biologist by training, assisted in the collection and verification of the information in the book.

3. Bologna, Jack, *A Guideline for Fraud Auditing*. San Francisco, California: Assets Protection, 1981. Pages: 24. Price: \$3.00. Paperback pamphlet. Publisher's address: Assets Protection, 500 Sutter St., Suite 503, San Francisco, CA 94102.

This small pamphlet explains the use of auditing techniques as a

tool of criminal investigation. Embezzlement, tax evasion, racketeering, and a host of complex, sophisticated crimes can often be detected only with the aid of trained accountants and auditors attuned to the peculiarities of the criminal mind. Fraud auditing involves examination of the books and records of a firm or other organization, together with consideration of various factors outside the paperwork. The chain of controls in the organization, and the possibilities for circumventing or overriding them, are important as is employee morale. Many other matters may suggest themselves to the experienced fraud auditor as worthy of investigation. Mr. Bologna provides a practical description of the white-collar criminal mind at work, illustrated by sample case studies. Considerable attention is paid to development of a "fraud scenario," a description of a firm or organization in terms of its exploitable weaknesses. He sets forth a fraud classification system and a set of definitions applicable to corporate fraud.

The author, Jack Bologna, is president of George Odiorne Associates, Inc., a management consulting firm in Plymouth, Michigan. He has had many years of experience with federal investigative agencies, including the Internal Revenue Service Intelligence Division and the Drug Enforcement Administration. Mr. Bologna holds degrees in law and accounting.

4. Boylan, Ann Marie, and Nadine Taub, *Adult Domestic Violence: Constitutional, Legislative and Equitable Issues*. Washington, D.C.: Legal Services Corporation Research Institute, 1981. Pages: approx. 520. Available free of charge. Paperback. Tables of authorities cited, appendices, notes. Publisher's address: Legal Services Corporation, 733 Fifteenth St., N.W., Washington, D.C. 20005.

The subjects of wife-beating and other domestic misconduct have received increased attention from the organized bar and social service agencies in recent years. The book here noted is an extensive review of the law of the various states pertaining to domestic violence. Both state statutes and court decisions are considered, and both substantive law and procedural requirements are examined. Traditional legal and equitable remedies are discussed, and constitutional issues raised by various remedies are considered. This work may well be of use to legal assistance officers. It may be obtained from the publisher free of charge.

The book is organized in two parts, which are in effect two volumes bound as one. Part I, which comprises almost three-fourths of the volume, consists of twenty-three chapters and several appendices. It is chiefly in this part that the law of the various states is reviewed. The general purpose of this section is to show the possibilities offered for drafting special legislation concerning wife-beating, for enactment in states where existing statutes do not deal adequately with the problem.

The shorter second part focusses on equitable forms of relief and limitations thereon. Constitutional questions are also considered. An abused wife may in many jurisdictions obtain a court order of eviction against an abusing husband. At least in theory, this could support a claim by the husband of denial of due process, because such proceedings tend to be conducted on an emergency basis, without prior notice and hearing for the abuser. Disqualification and discipline of judges who consistently ignore the claims of abused women is discussed as a possible course of action for women denied their rights.

Aids to the reader include a fairly detailed table of contents, an explanatory preface, and extensive tables of authorities cited. A table of short form citations is provided. The text has many footnotes, and many more citations are included in the text. A typewriter typeface is used, and the text is double-spaced.

Ann Marie Boylan, a member of the New Jersey bar, is the primary author of part I. Nadine Taub, an associate professor at Rutgers Law School, Newark, New Jersey, served as author for part II. The publishing entity, the Legal Services Corporation, is a federally chartered corporation in the District of Columbia, covered by subchapter X, Title 42, United States Code, specifically, 42 U.S.C. 2996 *et seq.* (1976). It is not an agency of the United States Government, except that it is supported by federal funds and its employees enjoy certain civil service benefits.

5. Department of the Army, *The ATLP Writer/Editor Handbook*. Fort Eustis, Virginia: U.S. Army Training Support Center, 1981. Pages: vi, 64. Looseleaf, with page size 5-½ inches by 8-½ inches, and small three-ring binder. Index. Publisher's address: U.S. Army Training Support Center, ATTN: ATIC-AET-LE, Fort Eustis, VA 23604.

Readability is a problem faced by all who prepare or use government publications. While no how-to-do-it manual can solve all problems of readability, simple instructions can help reduce the problems if followed consistently and adapted intelligently to the material at hand. The *Handbook* here noted, issued in July 1981, is intended to be such an aid. It replaces a temporary looseleaf publication called the Editor's Notebook, and, after a period of trial use, will be published as a U.S. Army Training and Doctrine Command (TRADOC) pamphlet during fiscal year 1982.

This looseleaf publication is organized in thirteen short chapters, which are grouped under three major headings. "Grammar, Usage, and Style" includes the chapters on capitalization, compounding, numbers, punctuation, shortened word forms, spelling, terminology, usage, and wordiness. "Techniques and Procedures" contains the chapters dealing with organization and readability, and ("Format and References" consists of chapters on those two subjects.

For the convenience of the user, the handbook offers a table of contents, explanatory preface, page of user information, and subject-matter index. Numbered paragraphs are used in the text.

The handbook was prepared by the staff of the editorial branch of the Armywide Training Literature Program, Army Extension Training Directorate, located at the U.S. Army Training Support Center, Fort Eustis, Virginia. The Army Training Support Center is an agency of the U.S. Army Training and Doctrine Command.

6. Dernbach, John C., and Richard V. Singleton 11, *A Practical Guide to Legal Writing and Legal Method*. Littleton, Colorado: Fred B. Rothman & Co., 1981. Pages: xviii, 246. Price: \$14.95, paperback. Two appendices; bibliography. Publisher's address: Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, CO 80127.

Words and their skillful use are a lawyer's stock in trade. The work here noted is a textbook designed to instruct first-year law students in the principles and practice of effective legal writing. The authors emphasize the interdependence of writing and legal method, by which they mean issue identification and analysis in the context of case law precedents and statutes. Preparation of office legal memoranda and appellate briefs are explained, with examples.

The text is organized in four parts. Part A, Introduction to Law, provides the most basic kind of general information for entering law students. The second part explains the authors' concept of legal method and issue analysis. Parts C and D deal, respectively, with preparation of office memoranda and briefs. Two appendices set forth a sample memorandum and two sample briefs.

The book offers a detailed table of contents, a foreword, and an explanatory introduction. There are no footnotes. Many hypothetical cases are scattered throughout the text. A bibliography identifies the actual cases upon which these hypotheticals are based.

Both authors are instructors at Wayne State University Law School, Detroit, Michigan. John C. Dernbach was born in 1953. He received his B.S. degree from the University of Wisconsin at Eau Claire, and his J.D. degree from the University of Michigan. He was admitted to the Michigan bar in 1979. Richard V. Singleton II was born in 1949. He received his B.A. degree from Guilford College, and his J.D. degree from Gonzaga University School of Law. Admitted to the Wisconsin bar in 1979, he pursued LL.M. studies at the University of Michigan, 1979-1980. He has been on the Wayne State faculty since 1978.

7. Douglas, William O., *The Court Years: 1939-1975*. New York City, New York: Vintage Books, div. of Random House, Inc., 1981. Pages: xi, 434. Price: \$5.95. Paperback. Appendix, index of cases discussed, subject-matter index. Publisher's address: Random House, Inc., 400 Hahn Road, Westminister, MD 21157.

This absorbing work is a first-person account of the life of the late Supreme Court Justice William O. Douglas. A controversial liberal gadfly, he served on the Court longer than anyone else in history. The book here noted is the paperback edition of the same work published in hardcover by Random House in 1980 at a price of \$16.95.

"Autobiography" is in part a misnomer for this work, as it concentrates entirely on Justice Douglas' career on the Supreme Court. For most readers that is surely the most interesting part of his life. Previously, for example, he had been employed by the Securities and Exchange Commission, in an important but lackluster job. For good or ill, it is Justice Douglas' years on the Court that make him a fascinating subject for study.

The book is organized in sixteen numbered chapters and a short postscript. The various chapters do not comprise a chronological account; rather, they deal with particular topics, either categories of cases, or groups of people. The titles include, "Loyalty-Security Program," "Separate but Unequal," "Law Clerks," "The Advocates," "The Press," "The Chief Justices," and others.

The work offers a set of illustrations, a publisher's explanatory note, a table of contents, and a subject-matter index. Three appendices set forth the text of the U.S. Constitution, a chronological list of Justice Douglas' law clerks, and an index of Supreme Court decisions discussed in the volume.

8. Dunn, Thomas Tinsley, *A Lawyer's Advice to Retirees*. Garden City, N.Y.: Doubleday & Co., Inc., 1981. Pages: xviii, 241. Price: \$14.95. Detailed table of contents, extensive appendices and sample forms, index. Publisher's address: Doubleday & Co., Inc., 245 Park Ave., New York, N.Y. 10017. Orders to: Doubleday & Co., Inc., 501 Franklin Ave., Garden City, N.Y. 11530.

As the decades go by, an ever larger portion of the American population is retired or close to retirement age. The problems of the elderly and retired are inescapably the problems of all of us. Most of us have aging parents or other close relatives, if we are not aged ourselves. This gives immediate importance to the subject of old age. Long term importance is based on the fact that we, too, will all be old some day if we live long enough.

The *Military Law Review* has previously noted a number of works on subjects of particular interest to aging people, whether retired or not. The most recent items are Michael's *Prime of Your Life*, 93 Mil. L. Rev. 127 (summer 1981), and *Federal Age Discrimination in Employment Law*, by Edelman and Siegler, 93 Mil. L. Rev. 105. Also noted have been works on estate and gift taxation and planning, 92 Mil. L. Rev. 165 (spring 1981), 90 Mil. L. Rev. 179 (fall 1980), and 90 Mil. L. Rev. 186, and civil commitment, 93 Mil. L. Rev. 91.

The book now noted is intended to be a practical guide to legal and financial planning for one's retirement years. Emphasis is placed on advance planning prior to retirement. The work is organized in two parts. Part I, "What to Do," consists of nineteen short

chapters on a great variety of topics, property ownership and management, estate planning, trusteeship, taxation, lawsuits and other disputes, obituaries, and the like. Part 11, "How to Do It," consists of dozens of sample forms, clauses, checklists, diagrams, and so forth, implementing in a variety of ways the suggestions discussed in part I.

In addition to the features described above, the work offers for readers an explanatory introduction, a detailed table of contents, and a subject-matter index.

The author, Mr. Thomas Tinsley Dunn, is an attorney specializing in trusts and estates in St. Petersburg, Florida, in the firm of Dunn and Dunn. Born in 1901, he received his B.S. and LL.B. degrees from the University of Virginia, and was admitted to the Florida bar in 1925. Mr. Dunn was employed as a trust officer in banks in a number of cities before settling in St. Petersburg.

9. Edwards, Mary Francis, and Kristine L. Meyer, *Settlement and Plea Bargaining*. Washington, D.C.: ATLA Education Fund, 1981. Pages: v, 388. Paperback. Publisher's address: ATLA Education Fund, 1050 Thirty-first St., N.W., P.O. Box 3717, Georgetown, Washington, D.C. 20007.

The authors of this work note in their introduction that most civil cases are settled out of court and most criminal cases are resolved through plea bargaining. Thus negotiation skill is as important to the trial lawyer as is courtroom advocacy. The Association of Trial Lawyers of America, through its Education Fund, has sponsored the preparation of *Settlement and Plea Bargaining* as part of the Association's program of continuing legal education.

The book is organized in twelve chapters, the first six dealing with settlement of civil suits, and the next five with plea bargaining in criminal cases. Each chapter consists of one or several essays by different practicing trial attorneys. Settlement and plea bargaining techniques and their practical application and enforcement are discussed at length. Among the settlement chapters are two dealing with structured settlements and the Model Periodic Payment of Judgments Act. Structured settlements involve a series of periodic payments, like an annuity, by the tortfeasor to the plaintiff, instead of one lump-sum payment. Structured settlement has received more

attention in recent years as jury awards have grown larger. It is a somewhat controversial subject, some arguing that structured settlement benefits defendants more than plaintiffs. A twelfth chapter compares settlement and plea bargaining documentation.

The book offers a detailed table of contents. There are few footnotes or citations, and most of these are included in the text. However, extensive bibliographical information is presented in one settlement chapter and one plea bargaining chapter. The text is printed in typewriter typeface on large (8½ inches by 11 inches) cream-colored pages, to promote easier reading. There is some use of charts, graphs, sample documents, and checklists. Development of evidence concerning economics is discussed at length in the settlement chapters, with practical examples and illustrations.

10. Eisenberg, Theodore, *Civil Rights Legislation: Cases and Materials*. Charlottesville, Virginia: Michie/Bobbs-Merrill, 1981. Pages: xxxvii, 972. Price: \$23.00. Detailed table of contents, tables of authorities cited, statutory appendix, index. Publisher's address: Michie/Bobbs-Merrill Law Publishing, P.O. Box 7587, Charlottesville, VA 22906.

The work here noted is a casebook intended for use in law school courses. The author explains that the material in the book can be used in two courses of three semester hours each. The book covers both legislation that protects constitutional rights, and legislation that establishes rights beyond the scope of the Constitution.

The book is organized in twelve chapters, the first seven of which comprise part one. The introductory chapter discusses the thirteenth and fourteenth amendments to the Constitution, and the following chapter reviews the statute at 42 U.S.C. 1983 (1976), which generally protects "rights, privileges, or immunities secured by the Constitution." The development of this provision in the courts is considered. Next are discussed defenses and immunities of individuals and governmental entities in civil rights suits. Relations between federal and state courts are examined, and judicial and statutory remedies are considered.

Part two consists of five chapters concerning various statutory, non-constitutional rights. These chapters focus on housing, contractual relations including public accommodations, employment dis-

crimination, voting rights, and discrimination in federally assisted programs.

For the convenience of users, the book offers an explanatory preface, a summary table of contents, a detailed table of contents, and various tables of authorities cited. A statutory appendix is provided. The book closes with a subject-matter index. The case law material is accompanied by explanatory comments and by lists of questions for discussion. The work has many footnotes, and these appear at the bottoms of the pages to which they pertain.

The author, Theodore Eisenberg, has served as an acting professor at the University of California at Los Angeles School of Law since 1977. Born in 1947, he earned his A.B. at Swarthmore in 1969, and his J.D. at the University of Pennsylvania in 1972. After clerking in Washington, D.C., for two years, he worked as an associate of the New York law firm of Debevoise, Plimpton, Lyons & Gates from 1974 to 1977.

The work here noted is an item in Michie/Bobbs-Merrill's Contemporary Legal Education Series.

11. Federal Register, Office of the, *The United States Government Manual 1981* 182. Washington, D.C.: Office of the Federal Register, 1981. Pages: vii, 948. Price: \$10.00. Paperback. Appendices, indices. For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. **20402**. Publisher's address: Office of the Federal Register, National Archives and Records Service, Washington, D.C. 20408.

The current edition of the *United States Government Manual*, like previous issues, is full of detailed information about the many agencies of the federal government, their structure and personnel, and the programs they administer. The *Manual* is an invaluable source of governmental information for the general public. The current editions reflects the personnel changes effected by the Reagan Administration since the beginning of 1981. The *Manual* is an official U.S. Government publication.

The book opens with "Guide to Government Information," discussing statutes and regulations affecting information availability, and providing a list of addresses and telephone numbers for dozens

of GSA Federal Information Centers throughout the United States. The texts of the Declaration of Independence and the Constitution are set forth thereafter.

Next follow three sections detailing the high-level agencies and offices of the legislative, judicial, and executive branches. These are followed by descriptions of the dozens of executive departments, independent agencies, and government corporations. There follows a short section on miscellaneous boards, committees, and commissions. Quasi-official agencies (such as the Smithsonian Institution) are listed thereafter, and the main body of work is concluded with descriptions of certain multilateral and bilateral organizations.

Six appendices provide information on such topics as abolished and transferred agencies; abbreviations and acronyms; organizational structure; and various statutes pertaining to information and privacy.

A detailed table of contents is provided, as is a three-part index of names of officials, subjects, and agencies. Charts and tables are used in many parts of the book. Recently confirmed presidential appointments are listed in a closing section, "Recent Changes."

The work was prepared by the Presidential Documents Unit of the Office of the Federal Register under the general editorship of Wilma P. Greene. The Office of the Federal Register is part of the National Archives and Records Service, of the General Services Administration.

12. Fenichell, Stephen, and Lawrence Charfoos, *Daughters at Risk: A Personal D.E.S. History*. Garden City, New York: Doubleday & Co., Inc., **1981**. Pages: **303**. Price: **\$15.95**. Hard cover. Index. Publisher's address: Doubleday & Co., Inc., **245** Park Ave., New York, N.Y. **10017**. Orders to: Doubleday & Co., Inc., **501** Franklin Ave., Garden City, N.Y. **11530**.

One frequently hears or reads that foods, beverages, medicines, and other items in the environment previously thought beneficial or at least harmless are suspected of causing cancer or other life-threatening or disabling diseases. Depressing as such information is, we are better off with the knowledge than without it. The only

problem is that such announcements have become so commonplace that they are likely to be ignored.

The book here noted tells the story of one victim of a cancer-linked medicine. The drug in question, diethylstilbestrol, or DES, is a synthetic estrogen compound formerly prescribed for pregnant women to prevent miscarriage or spontaneous abortion and to promote the growth of large fetuses. The drug may have worked, but fifteen or twenty years after birth, many of the children involved developed cancer. The book is the story of one of those children, Anne Needham, and her fight for survival and lawsuit against White Laboratories, manufacturer of the drug taken by her mother.

This is not a law book, although one of the two authors is an attorney and a substantial part of the text is devoted to description of the lawsuit and related legal maneuvers. The account is primarily a human-interest story. It may remind the reader of the well-known *Karen Ann: The Quinlans Tell Their Story*, by Joseph and Julia Quinlan with Phyllis Battelle (Doubleday & Co., 1977; Bantam Books, Inc., 1978) (noted at 80 Mil. L. Rev. 275 (spring 1978)); or of *Eric*, by Doris Lund (J.B. Lippincott Co., 1974), a story of a young man who died of leukemia.

A subject-matter index is provided. Stephen Fenichell is a journalist and a contributor to the *New York Post*, *Irish Times*, and *The Village Voice*. He covered the *Needham* trial and has reported on the DES controversy during the last several years. Mr. Fenichell lives in New York City. Lawrence S. Charfoos is an attorney in Detroit who represented Ms. Needham in her lawsuit, and who has made a speciality of advising victims of medical malpractice. He received his LL.B. degree from Wayne State University in 1959, and is a member of the firm of Charfoos and Charfoos, P.C.

13. Gillett, Mary C., *The Army Medical Department, 1775-1818*. Washington, D.C.: U.S. Army Center of Military History, 1981. Pages: xiii, 299. Appendices, notes, bibliography index. Publisher's address: Department of the Army, Center of Military History, Washington, D.C. 20314. For sale by Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

The American Bicentennial spawned a number of official histories, including one of the Army JAG Corps, *The Army Lawyer*,

published in **1975**. The book here noted was originally planned as a Bicentennial study of the Medical Department of the Continental Army. Subsequently the project was expanded, and this volume is the first of a series on Army medical history which will eventually be produced. Ms. Gillett's volume traces its subject from the American Revolution, through the War of **1812**, to the year **1818**, when the Army Medical Department was finally established on a permanent basis. (The Army's judge advocates did not achieve that status until **1849**.)

The book is organized in ten chapters, tracing the early history of the Army's Medical Department year by year. Contemporary letters, memoirs, and other unofficial source materials are used by the author because so many official records were destroyed by fire. Dozens of maps and illustrations are scattered throughout the text. Eleven appendices set forth the texts of various early statutes affecting the Army Medical Department, and other information. Footnotes are collected together after the appendices, and are followed by a bibliography and a subject-matter index.

This book is an official government publication published by the U.S. Army Center of Military History. The Center is headed by BG James L. Collins, Jr., Chief of Military History. Mr. Maurice Matloff, Chief Historian, serves as general editor for the Army Historical Series, of which the book here noted is part.

14. Gordon, Murray, editor, *Conflict in the Persian Gulf*. New York, N.Y.: Facts on File, Inc., **1981**. Pages: **173**. Price: \$17.50. Maps, index. Publisher's address: Facts on File, Inc., **460** Park Avenue South, New York, N.Y. **10016**.

The Persian Gulf is bordered by Iraq, Iran, Saudi Arabia, and several smaller states. Pakistan is immediately to the east of this waterway. Few areas of the world have been of more interest to Americans in recent years than this oil-rich, politically troubled region. The book here noted provides an overview of the history, problems, United States interests, and future prospects in this vitally important area.

The book is organized in seven unnumbered chapters. After an introduction, the problems faced by the United States in the Persian Gulf are described. Soviet activity, the alliance between the United

States and Pakistan, and the foreign relations of Iran under the Shah are reviewed in succeeding chapters. United States efforts to promote stability in the Gulf and to protect American interests are summarized. The work closes with a chapter describing the Iran-Iraq war of the past year.

The book offers a detailed table of contents and a subject-matter index. Several maps are provided. No footnotes, bibliography, or citation to sources or authorities are used.

15. Higham, Robin, and Donald J. Mrozek, editors, *A Guide to the Sources of United States Military History: Supplement I*. Hamden, Connecticut: Shoe String Press, Inc., **1981**. Pages: xii, **300**. Bibliographies. Publisher's address: Shoe String Press, Inc., **995** Sherman Avenue, P.O. Box **4327**, Hamden, CT **06514**.

Military history as a field of scholarship has mushroomed in recent decades. The *Review* has noted a number of works of military history, and these are but a few of dozens. Almost as important as substantive history itself are efforts to catalog and organize historical materials available. Two bibliographic works on military history have previously been noted in the *Military Law Review*. These are the Army's *A Guide to the Study and Use of Military History*, noted at 87 Mil. L. Rev. **191** (winter 1980), and also *A Bibliography of American Naval History*, published by the U.S. Naval Institute, and noted at 93 Mil. L. Rev. **100** (summer 1981).

The work here noted is a supplement to *A Guide to the Sources of United States Military History*, published in **1975**. That was a collection of essays describing the books, periodicals, and articles dealing with specified topics of military history. Covered were writings published or completed through **1972**. Supplement I adds coverage of the years **1973** through **1978**, together with earlier material on several subjects not previously covered in detail.

The book is organized in twenty-three chapters, dealing with various wars, topics, or periods of time. Most of the work is devoted to the Army and Navy. There is one chapter on the Air Force, and another chapter, a new one not in the **1975** book, on the Marine Corps. Special topics covered include military and naval medicine, museums, nuclear war and arms control, and government documentation.

Of special interest to military attorneys is a new chapter on military law, martial law, and military government. Mentioned therein are the official JAG Corps history, *The Army Lawyer*, published in 1975, and also the *Military Law Review*, the Navy's *JAG Journal*, and the *Air Force Law Review*. Many works by civilian scholars are included, such as *Justice Under Fire*, by Joseph W. Bishop, Jr., and *Swords and Scales*, by William T. Generous, Jr. (both reviewed by Colonel John L. Costello, Jr., at 65 Mil. L. Rev. 151 (summer 1974)). Unfortunately, no mention is made of the monthly companion to the *Review*, *The Army Lawyer*, or the Air Force periodical, *The Reporter*, or Army Defense Appellate's bimonthly, *The Advocate*. Otherwise this chapter seems to provide a fairly complete listing of writings on military legal history.

Each chapter is followed by an extensive bibliography. The entries in each bibliography also serve as the chapter's footnotes, through numerical references scattered throughout the text. A table of contents, explanatory editorial note, biographical sketches of the authors, and general introductory chapter are provided.

Robin Higham is a professor, and Donald J. Mrozek is an associate professor, in the history department at Kansas State University. In addition, Mr. Higham is an editor of *Military Affairs* and Mr. Mrozek has contributed articles to that magazine. Donald Nieman, author of the chapter on military law, martial law, and military government, is also an associate professor of history at Kansas State University. Most of the other contributors to the volume are also history professors. Several are archivists, librarians, or professional historians, some employed by the Army's Center for Military History and other military agencies.

The work here noted was published under the Archon imprint of the Shoe String Press. Further supplementation is expected in years to come.

16. Imwinkelried, Edward J., editor, *Scientific and Expert Evidence* (2d ed.). New York, N.Y.: Practising Law Institute, 1981. Pages: xx, 1353. Price: \$60.00. Detailed table of contents; index. Publisher's address: Practising Law Institute, 810 Seventh Ave., New York, N.Y. 10019.

This large volume containing writings by many legal scholars

deals with the burgeoning fields of scientific evidence and expert testimony. It is a second edition, replacing a work entitled *Scientific and Expert Evidence in Criminal Advocacy*, less than half the size of the present volume, published by Practising Law Institute in 1975. The aim of the present book is twofold, to describe the mechanics of the various techniques of discovering and analyzing evidence, and to explain how the trial attorney can obtain admission of the results into evidence, or oppose the same, as the case may be. Much of the material in this work has application primarily in criminal proceedings, but a significant portion could be used also in civil litigation and other types of evidentiary proceedings.

The book is organized in forty-three chapters which are grouped in four parts. The opening part consists of four chapters which give a general introduction to the field of scientific evidence, its history, current trends, tactical considerations, and particular problems of dealing with expert witnesses from both the prosecution and defense viewpoint.

The next part, "Instrumental Techniques Yielding Numerical Test Results," consists of eleven chapters discussing statistical problems, accounting evidence in tax cases, breathalyzers, gas chromatography, glass evidence, neutron activation and other types of trace analysis, and toxicology. This part is followed by "Instrumental Techniques Yielding Nonnumerical Test Results," with twenty chapters. Drug testing, explosives, fingerprinting, ballistics, document examination, odontology, polygraph testing, electron microscopy, serology, voice identification, and trace metal detection are covered in this part. The volume closes with eight chapters on "Software Techniques," including hypnosis, forensic pathology, autopsy, psychiatric techniques, and witness psychology.

For the convenience of users, the book offers a detailed table of contents, an explanatory introduction, an epilogue, and a subject-matter index. The text is heavily footnoted. In some chapters, the notes appear at the bottoms of the pages to which they pertain, and in others they are collected together at the end of the chapter. Many charts, tables, lists, and illustrations are scattered throughout the text. The editor has prepared headnotes for each of the chapters, summarizing the contents of the chapter.

The editor, Edward J. Imwinkelried, is a professor at Washing-

ton University School of Law, St. Louis, Missouri. Previously he served on the faculty of the University of San Diego School of Law from 1974 to 1979. He was formerly on active duty with the U.S. Army Judge Advocate General's Corps. He held the rank of captain, and was an instructor in the Criminal Law Division of The Judge Advocate General's School, Charlottesville, Virginia, 1972 to 1974. Professor Imwinkelried has published many writings on criminal law topics as either sole author or co-author. Among these writings are articles published at 63 Mil. L. Rev. 115 (winter 1974), 62 Mil. L. Rev. 225 (fall 1973), and 61 Mil. L. Rev. 145 (summer 1973). He was one of four co-authors of a textbook, *Criminal Evidence*, which was briefly noted at 84 Mil. L. Rev. 144-145 (spring 1979). Professor Imwinkelried obtained his undergraduate and legal education at the University of San Francisco, and is a member of the California bar.

17. Jordan, Amos A., and William J. Taylor, Jr., *American National Security: Policy and Process*. Baltimore, Maryland: The Johns Hopkins University Press, 1981. Pages: xiv, 604. Price: \$30.00 (hardcover); \$10.50 (paperback). Notes, index Publisher's address: Johns Hopkins University Press, Baltimore, MD 21218.

The military defense of the United States has been a subject of great public interest in recent years. The extent of that interest is perhaps indicated by the fact that the book here noted is intended for use as a college-level textbook. Since the Vietnam era, many colleges and universities, in undergraduate, graduate, and professional departments, have started offering courses and seminars dealing primarily with national security. Previously, such offerings were rare; the subject was merely one among many covered in courses on international relations, political science, and related subject-matter areas.

The book is organized in five parts and twenty-four chapters, reviewing step by step and topic by topic the entire process of American national security policymaking. The subject is first defined, the actors are introduced, and the basic executive and legislative processes are surveyed. National security issues are next discussed. The issues are first considered as specific topics, such as nuclear war, economic competition, and internal political revolution. Next, issues are examined in relation to geographic regions, the Soviet Union, the Middle East, and others. Finally, the book concludes with several chapters on national security policies for the 1980's,

with discussion of alliances, arms control, international forces, and other topics.

The work features a foreword by General Maxwell D. Taylor. Reader aids include a table of contents and a subject-matter index. Charts, statistical tables, and illustrations are scattered throughout the text. Chapters are concluded with lists of discussion questions and recommended readings. The footnotes are collected together at the end of the text.

The two authors have been members of the faculty of the United States Military Academy at West Point, New York.

18. Kentucky, Univ. of, Office of Continuing Legal Education, *Report of Seminar on Law and Aging*. Lexington, Ky.: Office of Continuing Legal Education, Univ. of Kentucky, 1981. Pages: 88. Paperback. Table of cases. Publisher's address: Office of Continuing Legal Education, College of Law, University of Kentucky, Lexington, KY 40506.

The book here noted is a collection of lectures presented at a seminar held on March 14 and 15, 1980, at the College of Law of the University of Kentucky, Lexington, Kentucky. The seminar was sponsored by the Office of Continuing Legal Education and the Multidisciplinary Center of Gerontology, both of them agencies of the University of Kentucky.

The *Military Law Review* has often noted publications concerning legal problems of older people, both retired and non-retired. Elsewhere in the present issue, the book *A Lawyer's Advice to Retirees*, by T.T. Dunn, is the subject of a note. Other works relevant to aging are mentioned in that note.

The seminar report consists of ten speeches, most of them supplemented with questions raised by, and answers given to the seminar audience. Topics covered by the lectures include incompetency and probate proceedings, rights of the handicapped, employment discrimination, insurance, estate planning, Social Security, and nursing homes. The book offers a table of contents, and a table of cases and other authorities mentioned or cited by the speakers. Generally, the work deals with its various topics in terms of Kentucky law, or of conditions peculiar to Kentucky.

The book was compiled by the staff of the Office of Continuing Legal Education of the University of Kentucky, headed by John K. Hickey as director. The various speakers include law professors, practicing attorneys, Social Security officials, and one nursing home administrator.

19. Kornhaber, Arthur, and Kenneth L. Woodward, *Grandparents/Grandchildren: The Vital Connection*. New York City, N.Y.: Doubleday & Co., Inc., 1981. Pages: xxvi, 279. Price: \$11.95. Appendix, notes, bibliography, index. Publisher's address: Doubleday & Co., Inc., 501 Franklin Ave., Garden City, New York 11530.

The role of grandparents in American family life is often a precarious one. Often regarded as a nuisance and a burden by their children and children-in-law, they frequently retreat into a pattern of infrequent contact with their grandchildren. Modern American society, with its emphasis on the primacy of the nuclear family (father, mother, children, and no others) and on high geographic mobility, has not made a place for eldsters. Yet, according to the authors of the work here noted, relationships with grandparents are extremely valuable in providing warmth, affection, and a sense of continuity for young children, especially in view of the extremely high divorce rate.

The authors conducted interviews with hundreds of children and encouraged them to draw pictures expressing their concepts of grandparents. Interviews were also conducted with grandparents, and questionnaires were submitted to them for completion. The authors separated respondents into three groups, according to whether the grandchild-grandparent relationship was close, remote, or in between. Although the authors recognize possible benefits to grandparents in a close relationship, they focus on the grandchildren's needs. Relatively few children have more than occasional contact, two or three visits a year, with their grandparents, and the authors believe that infrequent contact is worse than no contact at all. A list of recommendations for action is provided for use of grandparents who want to correct this deficiency.

The book opens with an introduction which states the problem. Five numbered chapters follow, "What Grandchildren Mean to Grandparents," and other titles. The work offers a detailed table of contents, and three appendices describing the mechanics of the sur-

veys conducted, questions used, responses obtained, and the like. Several dozen illustrations of childrens' drawings are grouped together. Extensive quotations from interviews are provided. Footnotes are collected together after the appendices, and are followed by a bibliography and a subject-matter index.

Arthur Kornhaber, M.D., is medical director of a pediatric neuropsychiatric group specializing in treatment of children and their families. Kenneth L. Woodward is a senior writer for *Newsweek* magazine. Both authors have published many previous writings on psychological and other topics.

20. Lillich, Richard B., editor, *The Family in International Law: Some Emerging Problems (Third Sokol Colloquium)*. Charlottesville, Virginia: Michie/Bobbs-Merrill, **1981**. Pages: xii, **164**. Price: **\$17.50**. Index. Publisher's address: Michie/Bobbs-Merrill Law Publishing, P.O. Box **7587**, Charlottesville, VA **22906**.

Recent decades have seen much change in American law concerning divorce, separation, child custody, and related matters. Less well known are the efforts made by legal scholars and government officials to update the United States' approach to family law problems that span international boundaries. The book here noted is a collection of four articles based upon papers presented by legal scholars at the Third Sokol Colloquium, held on April 6 and 7, **1979**, at the University of Virginia School of Law, Charlottesville, Virginia. These papers, prepared by law professors and other legal scholars involved with international family law, discuss international conventions and domestic case law affecting the family.

The Sokol Colloquia are a series of annual two-day meetings of legal scholars, practitioners, government officials, and others, who are brought together to discuss various topics of private international law. The Colloquia are sponsored by the Gustave Sokol Program in Private International Law, established in **1976** by a grant from the Gustave Sokol Fund. One of the major purposes of the Colloquia is to stimulate the publication of collections of essays focussing on particular topics of private international law.

The four articles which comprise the volume here noted are organized as four chapters. The first deals with the Hague Convention on Celebration and Recognition of the Validity of Marriages (1977),

which is under consideration for ratification by the United States. The second article focusses on the relationship, or lack thereof, between American domestic law concerning children's rights, on the one hand, and efforts to develop, or obtain ratification of, international agreements on the subject. The third discusses "Operation Babylift," the program for bringing Vietnamese orphans to the United States for adoption, and the legal problems involved. The final article considers United Nations efforts to produce and sponsor a children's rights' convention.

The book offers for the convenience of users an explanatory foreword, a detailed table of contents, and a subject-matter index. The articles are amply footnoted, and the notes appear at the bottoms of the pages to which they pertain.

The editor of this work, Richard B. Lillich, is Howard W. Smith, Professor of Law at the University of Virginia School of Law, and also serves as president of the Procedural Aspects of International Law Institute. He earned his A.B. at Oberlin College in 1954, his LL.B. at Cornell University School of Law in 1957, and his LL.M. and J.S.D. at New York University School of Law in 1959 and 1960, respectively. The several contributors are law professors, practitioners, and scholars who work and publish in the areas of family law or private international law, or both.

21. Lillich, Richard B., editor, *International Aspects of Criminal Law: Enforcing United States Law in the World Community (Fourth Sokol Colloquium)*. Charlottesville, Virginia: Michie/Bobbs-Merrill, 1981. Pages: ix, 245. Price: \$19.50. Index. Publisher's address: Michie/Bobbs-Merrill Law Publishing, P.O. Box 7587, Charlottesville, VA 22906.

In recent decades, more and more Americans have travelled and have had dealings across international boundaries. There are no areas of law, commercial, procedural, criminal, domestic relations, and others, that are not at least potentially of interest to these travellers, businessmen, and scholars. The book here noted is a collection of articles and notes on criminal law topics, based upon papers presented by legal scholars, practitioners, and State Department officials at the Fourth Sokol Colloquium, held during 1980 at the University of Virginia School of Law, Charlottesville, Virginia.

The Sokol Colloquia normally focus on problems of private international law. However, the sponsors of the Fourth Colloquium felt that there is no sharp line of division between criminal law and private law, and that people with extensive international dealings cannot avoid being aware of the impact of both areas of law on themselves and their associates and representatives.

The Sokol Colloquia are a series of annual two-day meetings of legal scholars, practitioners, government officials, and others, who are brought together to discuss various topics of private international law. The Colloquia are sponsored by the Gustave Sokol Program in Private International Law, established in 1976 by a grant from the Gustave Sokol Fund. One of the major purposes of the Colloquia is to stimulate the publication of collections of essays focussing on particular topics of private international law.

The several articles and notes which comprise the volume here noted are organized as three chapters. The first concerns obtaining jurisdiction over people, and extradition questions, especially pertaining to terrorists and other criminal suspects; and also discovery of evidence in foreign countries. The second chapter deals with the possibilities of enforcing United States law, including the Bill of Rights of the U.S. Constitution, outside the territorial limits of the United States, both on foreign territory and at sea. The third chapter focuses on protection of United States citizens abroad through treaties, specifically on the execution of penal sentences, especially prison sentences. Constitutional problems of detention of prisoners by the United States under prisoner exchange agreements are considered.

The book offers for the convenience of users an explanatory foreword, a detailed table of contents, and a subject-matter index. The articles are amply footnoted, and the notes appear at the bottoms of the pages to which they pertain.

The editor of this work, Richard B. Lillich, is Howard W. Smith Professor of Law at the University of Virginia School of Law, and also serves as president of the Procedural Aspects of International Law Institute. He earned his A.B. at Oberlin College in 1954, his LL.B. at Cornell University School of Law in 1957, and his LL.M. and J.S.D. at New York University School of Law in 1959 and 1960, respectively. The several contributors are law professors, practi-

tioners, and State Department officials who work in the areas of criminal law and foreign and international law.

22. Nash, Jay Robert, *Almanac of World Crime*. Garden City, New York: Anchor Press/Doubleday, **1981**. Pages: **452**. Price: **\$19.95**. Hardcover. Illustrations, bibliography, index. Publisher's address: Doubleday & Co., Inc., **501** Franklin Ave., Garden City, N.Y. **11530**.

Readers of detective stories and mysteries will greatly enjoy this work. It is an encyclopedic collection of information about hundreds of history's most famous crimes and criminals. Most of the personalities are American, but many countries are represented. Some episodes from ancient times and the middle ages are also described.

The book is organized in twenty-two chapters, arranged in alphabetical order by subject. The work opens with "Aliases and Monikers," "Arson," and "Assassination," and concludes with "Robbery," "Terrorism," and "Underworld Lingo." Types of crime, such as fraud, kidnapping, murder, and prostitution, are the subjects of some chapters. Other topics covered include capital punishment, courts and trials, law enforcement, and public reaction.

The book is written in an informal style, like a popular magazine. It is not a law book or a work of academic scholarship, although an extensive bibliography is provided. Many illustrations are interspersed throughout the text, and the various sections are identified with headings in bold-face type. A detailed subject-matter index closes the volume.

The author, Jay Robert Nash, is a journalist and popular historian of crime. He has published a number of books, including biographies of J. Edgar Hoover and John Dillinger, and a best seller, *Bloodletters and Badmen* (1973).

23. Nelson, Harold D., and Irving Kaplan, editors, Department of Army Pamphlet No. **550-28**, *Ethiopia: A Country Study* (3d edition). Washington, D.C.: Headquarters, Department of the Army, **1981**. Pages: xxix, **366**. Statistical appendix, bibliography, glossary, subject-matter index. Publisher's address: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. **20402**.

The American University, Washington, D.C., through its Directorate of Foreign Area Studies, has for years prepared Department of the Army area handbooks dealing with dozens of the world's nations. While these works do not set forth the official views of the United States government, they are government publications, in the DA Pamphlet No. 550 series. The Military Law Review has previously noted four area handbooks, or country studies, Zambia, at 88 Mil.L.Rev. 151 (spring 1980); Libya, at 88 Mil.L.Rev. 159; Angola, at 89 Mil.L.Rev. 118 (summer 1980); and Iraq, at 89 Mil.L.Rev. 126. These works are full-length books and follow a standard format.

The present work replaces the *Area Handbook for Ethiopia*, published in 1970. In 1974, the Emperor Haile Selassie and his government were overthrown, and the most sweeping political and social changes in decades came in the following years. The new third edition was clearly necessary to document these changes.

Like other area handbooks or country studies, the new study of Ethiopia is organized in five chapters, each by a different author but all comprising an integrated whole. The opening chapter describes the history of Ethiopia, with emphasis on developments in the twentieth century. Chapter 2, "The Society and Its Environment," describes the physical terrain, ethnic groups, language, social system, religions, and related matters. The next three chapters consider Ethiopia's economy, its government and political processes, and its system for national security, or defense. Sadly, Ethiopia has been torn by internal conflict, involving ethnic rivalries and separatist ambitions, in many areas.

For the use of readers of the book, an extensive statistical appendix, a bibliography, a glossary of terms, and a subject-matter index are presented. The work also offers a detailed table of contents. Many charts, figures, and illustrations are scattered throughout the text. A six-page "country profile" provides a thumbnail sketch of Ethiopia.

The editors and chapter authors are scholars associated with the American University under the supervision of Mr. William Evans-Smith, Director of Foreign Area Studies.

24. Nicolai, Sandra, *et al.*, *Careers in Criminal Justice*, Lincoln,

NE: Contact, Inc., 1981. Pages: iv, 156. Price: \$8.00. Paperback. Statistical tables and charts; address lists. Publisher's address: Contact, Inc., P.O. Box 81826, Lincoln, NE 68501.

The work here noted is addressed to employment counselors, high school guidance counselors, and others who advise people on job opportunities or selection of careers. The careers presented are primarily non-attorney positions such as police and parole officers, court officials, prison guards, social workers, teachers for prison schools, and the like. Descriptions of jobs are provided, with information about opportunities, educational requirements, salaries, and other data, state by state. Many statistical tables and charts are provided. The work noted is apparently an update of a previous edition.

The book is organized in seven unnumbered chapters. The first chapter, comprising almost half the book, describes many specific jobs or careers. Emphasis is placed on positions for parole and correctional officers of various types, but brief mention is made of jobs for law students, and also judicial salaries state by state. A bibliography of writings on criminal justice careers is provided. Information about employment prospects, unionization, and other topics is provided.

The other chapters supplement the first chapter. "Job Hunting Resources" discusses job interviews, sources of information about available jobs, and related topics. Lists of relevant addresses are provided. Chapters are devoted to education, volunteer work, paralegal employment opportunities, jobs for women, and finally, "Opportunities for Ex-Offenders." A detailed table of contents is provided.

This work was prepared by the staff of Contact, Inc., of Lincoln, Nebraska. Sandra Nicolai is vice president for information at Contact, Inc., and was assisted in the preparation of the book by four other staff members. Contact, Inc., is an organization devoted to the collection, study, and dissemination of information about the American system of criminal justice, with emphasis on corrections or penology. A job referral service is operated for ex-convicts and others in need of assistance. The organization has two monthly publications, the *Contact Newsletter* and the *Corrections Compendium*. Various books such as the one here noted are also published.

The organization is funded by receipts from the sale of these publications, and from payments of dues by various categories of members.

25. Nicolai, Sandra, *et al.*, *The Question of Capital Punishment* (2d ed.). Lincoln, Nebraska: Contact, Inc., **1981**. Pages: **152**. Price: **\$10.00**. Paperback. Tables, diagrams, bibliography, glossary. Publisher's address: Contact, Inc., P.O. Box **81826**, Lincoln, NE **68501**.

The revival of the death penalty has received considerable publicity in recent years. In **1972**, the United States Supreme Court decided in the case of *Furman v. Georgia* that the state capital punishment statutes then in force were all unconstitutional. No one had been executed since **1967**, however. After the *Furman* decision, many states enacted new capital punishment statutes and, in **1976**, the Supreme Court found capital punishment constitutionally acceptable again. Executions were resumed with Gary Gilmore in **1977**.

In the military services, the last execution for a military offense took place in **1945** (United States v. Slovik, CM ETO **555** (**1945**) (desertion, in a combat situation). Imposition of capital punishment for military offenses has been a rare occurrence. The last execution for a nonmilitary offense occurred in **1956** (United States v. Bennett, **7 C.M.A. 97, 21 C.M.R. 223** (**1956**) (rape and attempted murder of an eleven-year-old girl). The constitutionality of the military death penalty has not been challenged in court, for lack of an actual case to serve as a vehicle for such a challenge. Apparently the death penalty has always been available to the military services.

The questions of whether the death penalty is a proper form of punishment, and what the death penalty is supposed to accomplish, have been extensively debated in many civilian jurisdictions. There has been little discussion (other than academic) in the military services.

The work here noted is a compendium of information about capital punishment in America, its history and practice, various methods used, applicable statutes, the executioners, and the condemned themselves. Statistics on the extent and manner of imposition of the death penalty are provided, broken out by gender, race, and other characteristics. The book is addressed to criminal lawyers who han-

dle capital cases, and also other attorneys and concerned citizens who are interested in the issue of capital punishment.

The work provides extensive information concerning capital punishment, without taking an explicit stand for or against the death penalty. The present reviewer has the impression, however, that the editors are somewhat defense-oriented and are inclined to oppose the death penalty. This is not cited as a defect of the work; neutrality concerning the death penalty is scarcely possible, and perhaps is not even desirable.

The book is organized in ten chapters. Reader aids include a detailed table of contents, explanatory introduction, and table of updating information. For purposes of comparison, a chapter on the death penalty in foreign countries is provided. Citations are provided partly in footnotes and partly in text. A chapter on sources of information includes a bibliography. A glossary of terms is provided.

The Question of Capital Punishment is a publication of Contact, Inc., of Lincoln, Nebraska, which describes itself as "an international, non-profit criminal justice information and human services clearinghouse founded in 1964 by Gary Hill, president." The chief editor of the work here noted is Sandra Nicolai, who serves with Contact, Inc., as vice president for information. The organization is much interested in correctional facilities, their inmates, staff, and programs, and in providing assistance to ex-offenders in obtaining employment.

Contact publishes a number of books, pamphlets, and periodicals, including a monthly magazine, *Corrections Compendium*, which provides up-to-date information concerning legal and administrative developments affecting prisons and prisoners, and new programs, publications, and other matters pertaining to prison life and work. The book *Careers in Criminal Justice* is noted elsewhere in the present issue of the *Military Law Review*. Contact also has published *Reducing Functional Illiteracy: A National Guide to Facilities and Services*, and *Survival Sourcebook*, concerning community services, which deal with topics other than prison activities.

26. Rothstein, Paul F., editor, *Rules of Evidence for the United States Courts and Magistrates* (second edition). New York, N.Y.: Clark Boardman Co., Ltd., 1979. Pages: xiv, 600. Price: \$40.00.

Looseleaf format, with binder. Also available in paperback student edition. Appendix; index. Annual supplementation of looseleaf edition. Publisher's address: Clark Boardman Company, Ltd., **435** Hudson Street, New York, N.Y. **10014**.

The Federal Rules of Evidence, **28** U.S.C. app. (1976), are no longer new, having taken effect on July **1**, **1975**. However, military practitioners can be expected to have far less familiarity with the Federal Rules than do civilian trial attorneys in federal practice. The new Military Rules of Evidence are based upon and in many cases copied from the text of the Federal Rules. Court decisions interpreting and applying the Federal Rules are therefore often relevant to military evidentiary questions. Thus, military trial lawyers can make use of treatises on the Federal Rules even though oriented to civilian trial practice.

The *Military Law Review* has previously commented on publications concerning both the Federal Rules and the Military Rules of Evidence. The *Military Rules of Evidence Manual*, by S. Saltzburg, L. Schinasi, and D. Schlueter, has been briefly noted at **93** Mil.L.Rev. **139** (summer 1981), and is formally reviewed by Major Joseph Rehyansky earlier in the present volume. The *Federal Rules of Evidence Manual*, by S. Saltzburg and K. Redden, is reviewed by LTC Herbert J. Green at **89** Mil.L. Rev. **96** (summer 1980) and briefly noted at **89** Mil.L. Rev. **130**.

The Rothstein book here noted follows the plan of organization of the Federal Rules themselves, rule by rule. After a preface summarizing the history of the Federal Rules, the text of each rule is presented, followed by a detailed "practice comment" and extensive textual footnotes prepared especially for the volume. Following each practice comment, the Supreme Court Advisory Committee's Notes are set forth. A three-part appendix sets forth extracts from the House of Representatives and Senate reports concerning the Rules. The paperback student edition of the Rothstein work includes three additional appendices. These set forth various provisions deleted from the Rules as finally enacted; the privilege provisions of the Uniform Rules of Evidence; and various materials on criminal presumptions.

In addition to features already mentioned, the work offers a table of contents and subject-matter index. The editor, Paul F.

Rothstein, has been a professor at the Georgetown University Law Center since 1971. He received his B.S. degree in 1958 and his LL.B. in 1961 from Northwestern University, Chicago, Illinois. Professor Rothstein formerly was a member of the faculty of the University of Michigan Law School, 1963-64, and the University of Texas Law School, 1964-67. He was in private practice with a firm in Washington, D.C., from 1967 to 1971.

27. Sapp, Diane E., *Our Mission, Your Future," The United States Disciplinary Barracks, Fort Leavenworth, Kansas, An Overview*. Minneapolis, Minnesota: Diane E. Sapp, 1981. Pages: x, 200 (approx.). Tables, appendicies. Publisher's address: CPT Diane E. Sapp, 4663 Penkwe Way, Eagan, MN 55122. Very few copies prepared. One copy available in Library, The Judge Advocate General's School, Charlottesville, VA 22901.

The work here noted is a master's thesis in which the author examines the Army's correctional system. The great majority of soldiers never get into trouble serious enough to bring them into contact with the correctional system. For the minority who do, the Army seeks to do justice while maintaining discipline, and to reform wrongdoers and restore them to duty if possible. If restoration to duty is not feasible, the Army hopes at least to give the wrongdoer the means of assuming a useful and productive role in civilian society.

The capstone of the Army's correctional facilities is the prison at Leavenworth, Kansas, popularly called "the Castle." Its official name is the United States Disciplinary Barracks. In recent years the work of this facility has been supplemented by the U.S. Army Retraining Brigade, an organization with lower security requirements, at Fort Riley, Kansas. Prisoners are assigned to the Disciplinary Barracks primarily to serve their sentences until parole or later. The Retraining Brigade, on the other hand, is not primarily a prison organization. Its purpose is to put its members through a rigorous training program with the object of restoring them to duty if possible. The book here noted deals at length with both these facilities.

The book is organized in six chapters. The first tells the history of Fort Leavenworth, the Army's various prisons of the past, and the current prison at Leavenworth, as well as the Retraining Brigade

at Fort Riley. Chapter 2 provides a brief overview of the system of military justice, including the various types of courts-martial, showing how a prisoner comes to be at the Disciplinary Barracks or the Retraining Brigade. The third chapter describes the current organizational structure of the Disciplinary Barracks.

Chapter 4, "The Army Correctional System," focuses on penology. There is discussion of theories of what imprisonment is intended to accomplish; the various grades or degrees of custody; different types of educational, vocational, and treatment programs available; and the work release program. Chapter 5 provides a brief account of the program for restoration to active duty, and of clemency and parole opportunities. The sixth chapter is a summary and a statement of the author's conclusions.

The work offers a detailed table of contents. The text is reproduced from a typewritten, double-spaced original. Footnotes are extensive and are collected together at the end of each chapter, with bibliographic information. There is some use of statistical tables and figures in the text, and an appendix sets forth further statistics and two photographs of the Disciplinary Barracks.

The author, Diane E. Sapp, is a captain, Military Intelligence, in the U.S. Army. She pursued an M.A. in criminal justice studies at the University of Minnesota during 1981.

28. United Nations Educational, Scientific and Cultural Organization, *UNESCO Yearbook on Peace and Conflict Studies*. Westport, Connecticut: Greenwood Press, 1981. Pages: xxix, 311. Price: \$30.00. Tables and lists. Index. Publisher's address: Greenwood Press, ATTN: Marketing Department, 88 Post Road West, Westport, CT 06881.

The United Nations is a controversial organization which does not enjoy a high level of credibility among many Americans. A few of its agencies, however, enjoy a better reputation, and UNESCO is one of these. The book here noted is intended as the first of an annual series whose purpose is to pull together information on public and private research and writing around the world on the subject of peace and how to attain and preserve it. The work is more than an annotated bibliography, although it provides extensive information

of that nature. It is a collection of essays reviewing the literature on various aspects of peace.

The *Military Law Review* has often noted the publications of the Stockholm International Peace Research Institute, or SIPRI, of Sweden. The most recent such publication noted is SIPRI's eleventh yearbook, at 92 Mil. L. Rev. 181 (spring 1981). A number of other countries have similar organizations, either governmental or academic or both, although SIPRI is one of the most prolific in publication.

The book is organized in three parts, "Approaches to Teaching and Research," "Bibliographical Studies," and "Institutional Developments." Each of these parts is further subdivided by topic. The first part, by several authors, discusses how scholarly information on war and peace is obtained, analyzed, and disseminated. The second part is essentially an annotated bibliography. The third part opens with discussion of the International Peace Research Institute (IPRA), its purposes, structure, activities, and publications. The IPRA is supported by UNESCO funding and should not be confused with SIPRI, mentioned above. Part III closes with descriptions of efforts to organize peace research institutes in several countries, and with news reports from already existing institutes.

Nineteen authors have contributed to this volume. They are from all regions of the world, but the United States, the Soviet Union, and Western Europe are the origins of most. They are professional social scientists, and are members of university facilities or hold senior positions on peace research institute staffs or in other similar organizations, private and public.

29. Zemans, Frances Kahn, and Victor G. Rosenblum, *The Making of a Public Profession*. Chicago, Illinois: American Bar Foundation, 1981. Pages: xvi, 247. Price: \$12.00, cloth; \$5.00, paperback. Statistical tables and figures, two appendices, list of references consulted. Publisher's address: American Bar Foundation, ATTN: Director of Publications, 1155 East 60th Street, Chicago, IL 60637.

Lawyers are much inclined to criticize law schools and legal education generally on a variety of grounds. The American Bar Foundation has sponsored a number of studies during the past several years to determine specifically what takes place in law schools, and

what are the effects on law students. The work here noted is one of these studies.

The two authors analyze the concept of professionalism and discuss the extent to which law school and other influences contribute to the professionalism of attorneys. The authors conclude that, while law school is a significant source of professional attitudes and values, it is only one of several. For example, new attorneys seem to learn a great deal from older attorneys in their firms or offices. The authors discuss these other sources and suggest paths for future research to follow.

The book is organized in eight chapters. An introductory chapter provides an overview of the legal profession. Chapter 2 discusses the design of research projects concerning professional development of lawyers. The next several chapters set forth information about various aspects of professional preparation, in law school and out of it. Chapter 7, "Socialization to Professional Responsibility," pulls together the data amassed in the earlier chapters, and the final chapter sets forth the authors' conclusions.

The study is statistical in nature, and many charts and graphs are set forth. A detailed table of contents is presented, with lists of the tables and figures. An explanatory foreword and a preface follow. Many footnotes are used. The appendices set forth a questionnaire used to collect data from five hundred Chicago-area attorneys, and a short essay on rating law schools.

The American Bar Foundation, sponsor of this study, is a research and publication arm of the American Bar Association. The Foundation's "mission is to conduct research that will enlarge the understanding and improve the functioning of law and legal institutions." The series of research studies of which the work here noted is a part was started in 1974.

INDEX FOR VOLUME 94

I. INTRODUCTION

This index follows the format of the cumulative indices which were published as volume **91** (winter **1981**) and as volume **81** (summer **1978**) of the *Military Law Review*. Those indices are supplemented in volume **92** (spring **1981**) and succeeding volumes.

The purpose of one-volume indices is threefold. First, the subject-matter headings under which writings are classifiable are identified. Readers can then easily go to other one-volume indices in this series, or to the cumulative indices, and discover what else has been published under the same headings. Second, new subject-matter headings are most easily added, volume by volume, as the need for them arises. Third, the volume indices are a means of starting the collection and organization of the entries which will eventually be used in other cumulative indices in the future. This will save much time and effort in the long term.

This index is organized in five parts, of which this introduction is the first. Part II, below, is a list in alphabetical order of the names of all authors whose writings are published in this volume. Part III, the subject-matter index, is the heart of the entire index. This part opens with a list of subject-matter headings newly added in this volume. It is followed by the listing of articles in alphabetical order by title under the various subject headings. The subject matter index is followed by part IV, a list of all the writings in this volume in alphabetical order by title.

The fifth and last part of the index is a book review index. The first part of this is an alphabetical list of the names of all authors of the books and other publications which are the subjects of formal book reviews published in this volume. The second part of the book review index is an alphabetical list of all the reviews published herein, by book title, and also by review title when that differs from the book title. Excluded are items appearing in "Publications Received and Briefly Noted," above, which has its own index.

All titles are indexed in alphabetical order by first important word in the title, excluding, *a*, *an*, and *the*.

In general, writings are listed under as many different subject-matter headings as possible. Assignment of writings to headings is based on the opinion of the editor and does not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any governmental agency.

Certain publications notes are included in this index. Most publications notes do not have lasting value and are therefore not indexed. The notes now indexed all concern publications whose authors are or at some time in the past have served as judge advocates in one of the military services. These particular notes may consequently be of historical interest. (The first indexing of publications notes appears in volume 93, the summer 1981 issue.)

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By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief & Staff

Official:

ROBERT M. JOYCE
Brigadier General, United States Army
The Adjutant General